

JAN 24 1919

JAMES D. MAHER

IN THE
Supreme Court of the United States
OCTOBER TERM, 1918.

JACOB FROHWERK,

Plaintiff in Error,

v.

THE UNITED STATES OF
AMERICA,

Defendant in Error.

No. 685

Error to the District Court of the United States, for the
Western Division, of the Western District of Missouri.

STATEMENT, BRIEF AND ARGUMENT ON BE-
HALF OF PLAINTIFF IN ERROR.

By JOSEPH D. SHEWALTER,

Counsel,

Independence, Mo.

Let us beware how we borrow weapons from the
armory of arbitrary power. They cannot be wielded
by the hands of a free people. Their blows will
finally fall upon themselves."

Ex-Justice Benj. R. Curtis (see P. 61).

Those who have once bowed the knee to force,
must expect that force will be forever their master."

(Hallam's Const. His. England 1 Chapt. 10.)

"I am for freedom of the Press and against all
violations of the Constitution to silence by force,
and not by reason the complaints or criticisms, just
or unjust, of our citizens against the conduct of
their agents."

(Jefferson, Vol. 3, p. 479.)

PREFACE.

(Please Read.)

THE FOLLOWING BRIEF IS LONG. IT TOOK EIGHT YEARS TO ESTABLISH AMERICAN LIBERTY. THIS BRIEF SEEKS TO PRESERVE WHAT WAS THEN WON AND WHICH IS NOW IN DANGER AS NEVER BEFORE. IT IS BELIEVED IT COVERS THE WHOLE FIELD.

The Brief does not cover the questions special to this case. This is caused by the fact that unfortunately a rupture occurred between client and attorney. This does not involve the legal questions. But the Court is asked to see these in Brief set forth Demurrer page 4, Motion to Dismiss 5., Specification of Errors and in full Printed Transcript, pages 56, 67 and 80. They are a Brief almost on the points. This Brief is the property of the Author and has been so decided by a State Court. Others have no right to sell it, and have been enjoined from doing so.

ANNOUNCEMENT.

When peace shall fully be restored, it is the purpose of the Author to compile a volume upon this important subject. It will consist of the following. First, The Virginia Resolutions written by Mr. Madison; the Kentucky Resolution written by Mr. Jefferson. 2. The celebrated Report of Mr. Madison on the Virginia Resolutions. 3. This Brief which maintains the same views as the former, omitting those portions peculiar to this case and not embraced in the general subject. 4. The brief of Alexander C. King, Esq., the Solicitor General, who maintains the reverse on this question. 5. The Opinion of the Court on the same subject. And also the Opinion of the Court in the *Avers case*, holding Conscription valid. So far as all relate to Speech and Press.

This will probably give, practically, all the information pertaining to a subject so important to the future welfare of the American people.

JOSEPH D. SHEWALTER,
Independence, Mo.

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PLEASE READ—WHOLE QUESTION IS HERE IN INDEX
IN CONCRETE.

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CORRECTIONS.

The Author is a poor proof reader. Some few errors occur of little importance, some are here noticed:

- P. 10, "Brief" second par., read "Bill."
- P. 21, 7th line top "Republican" reads "Republics."
- P. 47, "after had been declared" write "all existed."
- P. 82, 8th line top after "with" add "that."
- P. 111, from top 11 line "1964" read "1864."
- P. 117, 14 lines from bottom erase "it."
- P. 119, "words of John Adams" read "works of John Adams."
- P. 126, 10 line bottom "general claim" read "general clause."
- P. 132,—3rd para., 6th line "in" read "on."
- P. 166, 3rd line "arose" read "arise." Last line, first para. erase "to"; second line, bottom, erase "If not" insert "by."
- P. 176, 17 line top "a new department" read "a new departure."
- P. 177, 3rd. par., "raise powers" read "raise armies."
- P. 225, "English story writer" read "Tory writer."
- P. 324, "1902" read "1912."
- P. 333, "And Army" read "An Army."
- "Manning" read Manard 325
- P. 2 Index, "Const." not "*suspected*" read "suspended."

IN THE
Supreme Court of the United States

OCTOBER TERM, 1918.

JACOB FROHWERK,

Plaintiff in Error.

v.

THE UNITED STATES OF
AMERICA,

Defendant in Error.

No. 685

BRIEF ON THE PART OF THE PLAINTIFF IN ERROR

(1) CONCISE STATEMENT OF THE CASE.

This is an Indictment returned by the grand jury in the United States District Court for the Western Division, of the Western District, at Kansas City, Missouri. It contains thirteen counts, and they are based on the Third and Fourth Sections of Act of June 15th, 1917, known and commonly called the Espionage Act.

The first count charges a conspiracy under the Fourth Section, for alleged commission of certain acts prohibited by the Third Section. It charges a conspiracy entered into by plaintiff in error (and designated hereafter for brevity as Defendant) and one Carl Gleeser in violation of the said Section of said Act. It is important to state somewhat at length and impress the exact charge, as contained in the first count, and we call the attention of the Court to the Indictment as found in the record. One of the important points, raised by the record, arises out of the charge of the conspiracy as therein contained.

It sets out, after the formal allegation of the declaration of war, that and an allegation that Gleeser and Frohwerk were publishing a paper:

“That the said Carl Gleeser and Jacob Frohwerk so being engaged in the preparation, publication, distribution and circulation of said newspaper” giving its name “did, on or about the 22nd day of June, 1917, at Kansas City, Jackson County, Missouri, within the Western Division, of the Western District of Missouri, and within the jurisdiction of this Court, unlawfully and feloniously conspire, confederate and agree together and with divers other persons, to the Grand Jury unknown *to commit an offense against the United States of America*, that is to say, *to violate Section Three (3) Section I, of the Act of Congress approved June 15th, 1917, entitled ‘An Act to punish acts of interference with the foreign relations, the*

neutrality and the foreign commence of the United States, to punish Espionage and better to enforce the criminal laws of the United States and for other purposes' *by willfully causing and attempting to cause insubordination, disloyalty, refusal of duty in the military and naval forces of the United States of America; that is to say, to violate Section 3 of the Title of the Act aforesaid by willfully obstructing the recruiting and enlistment service of the United States and to the injury of the United States when and while the United States was at war with the Imperial Government of Germany as aforesaid.*" (Italics added.)

It will be seen that no terms of agreement, as elsewhere said, are stated; or *how or in what manner the parties had agreed* (or had agreed at all), to do the prohibited acts. Stripped of all verbiage it is simply a charge that they conspired to violate a certain designated Act, giving its title, under which, if valid, any agreement, by which the prohibited acts could be carried out, might be shown.

The Indictment then proceeds to charge *as the overt act* that in pursuance of the conspiracy they prepared, published and circulated certain newspaper articles.

It will be seen that the Indictment, in the charging part, nowhere sets out, or alleges, *the terms of the agreement* as to either time, place, means, or circumstances, but simply alleges the parties entered into an unlawful agreement, *to violate the act*

aforesaid; describing it by its title. And it charges "That the said Carl Gleeser and Jacob Frohwerk, so being engaged *in the preparation, publication, distribution and circulation* of said newspaper" (italics being here added) prepared, printed and circulated it may be inferred, *such being their business*, that the conspiracy, if formed, *was to be carried out by publications*. But inferences will not do, and it is nowhere so charged, the conspiracy was to be by publications of the paper.

Again in this count, nor in the second and subsequent counts is it charged, that the "Statements" in the publication or "reports" were "*false*", or that they were made with the criminal "*intent*" set forth in the statute, and as necessary to the offense.

The remaining twelve counts charge, separately *the specific acts* of publication, before alleged, as the overt act under the first count. That is, they charge these publications, before alleged, under the conspiracy count as substantiative offenses, by the second and subsequent counts.

On June 4th, 1918, a Demurrer to the Indictment was filed. It sets forth formally, and at large, that the Indictment, in neither count thereof, charges any offense—no power over Speech and Press, no charge of a conspiracy; no allegations that the statements and reports were false, or made with criminal intent; that it sought to inflict double punishment, by charging the publications as the overt act, in the conspiracy count, and as substan-

tiative offenses in the subsequent ones (Please see the same in the record. Not yet being printed we cannot give pages). These objections by Demurrer are substantially, the same as set forth in the Assignment of Error, and also in the "Points" filed here for argument.

On the same day the Court set the demurrer for argument and hearing, for June 24th, 1918, *and immediately*, over the protest and exception of the Defendant, ordered and directed a venire to be issued, to the Marshal, ordering and directing him to summons and draw a panel of forty jurors, to be returned for June the 25th—the day after that set for argument on the demurrer. Defendant excepted to this action, as being unauthorized, since there was no issue of fact to be tried by jury pending, but an issue of law only then pending; and this action of the court, in addition to being unauthorized, tended to the prejudice of the hearing on the Demurrer, and was equivalent to a statement by the Court, that the demurrer would be overruled, though then it had not been heard.

Afterwards on the 24th day of June and before argument of the demurrer Defendant filed a Motion to dismiss the Indictment, and strike the cause from the docket, for the reason that Section Three of the Act on which rested each count had been *superseded and incorporated into a new act covering the same subject*, approved May 20, 1918, whereby all prosecutions under the first act

cease—there being no saving clause in the new auxiliary act; and this constituted the last expression of the legislative will and was the only law on the subject. *We wish to make this exact point clearly understood.* It was not claimed that the act Section Three was *repealed*, thus saving prosecution under the Thirteenth Section of the Practice Act. But that it was *revised* and *incorporated* into the new act and hence was never repealed in the sense of Section 13 and at the time the Act of May 20th, 1918 *constituted the only law on the subject.* This motion was overruled, and exceptions as shown by the record.

Thereupon the demurrer was taken up, and was orally argued by counsel. The argument occupied with authorities read, about four hours, and was listened to by the Court with seemingly great interest and respect. Counsel had previously furnished to Judge Frank A. Youmans, who sat in the case, a printed Brief, and also a copy to the Government, embracing substantially the matters set forth in the Brief herein.

Immediately on the conclusion of the oral argument, and without calling upon the United States Attorney for any reply, the Judge retired and at once returned, and read from manuscript a long typewritten opinion, prepared, of course, in advance. *Defendant requested that the opinion be filed,* and, as shown by the record, also filed a written motion to that effect the next morning, but the

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Judge refused to file the opinion. Its contents was as follows, so far as it is able to be stated—we think, accurately:

First: That the purchase of Louisiana by Jefferson, was illegal; and also that the Embargo Act was also unconstitutional, and brought great distress. On the last point he read extensively from Professor Wilson's (now President) American People. These charges formerly made have often been refuted, and no allusion had been made to them whatever, in either the oral or printed argument.

Second: That nullification was unconstitutional and illegal (a proposition which none are more ready to admit than the counsel, it being the very reverse of secession). The Judge in this connection read from Jackson's Proclamation.

Third: He next stated that secession was illegal, and read from authorities on that point. And in the course of the opinion, touching perhaps on the reference by counsel to the Virginia and Kentucky resolutions and Mr. Madison's Report, that these asserted also that the Constitution was a compact to which the States were parties and this doctrine had been overthrown by the Civil War. Counsel had made no allusion to this matter.

Fourth: He then dwelt somewhat at length upon the cruelties and inhumanities of the Germans, stating among other things that his Mother was born in Germany. This we think is a fair summary

of the opinion, *and all of which matters had nothing to do whatever with the questions* discussed. So defendant insisted he had been deprived of his day in court.

A long Brief and oral argument had contained nothing calling for these views and could not but be regarded as conceding that points made and authorities cited could not be answered.

The next morning, June 25th, before the jury was called, the defendant being called upon to plead, declined to do so for the reason that a jury had already been summoned, before such plea, and when no issue of fact was pending; and because he had been refused his day in court. Thereupon the Court ordered the indictment read and as it was so read directed the usual plea of not guilty. The jury was impaneled and the trial commenced.

After the plea of not guilty had been entered defendant filed a written request and motion that the cause be postponed, so as to give the defendant a reasonable time, to which he claimed a Constitutional right, after the plea of not guilty, to summon witnesses and prepare for trial, showing that he had been advised, by counsel, that while the demurrer was pending, and an issue of law only raised, there was no authority to summon witnesses, nor to take depositions. This written motion was overruled and excepted.

During the progress of the trial, as shown by the record, defendant asked for a subpoena for two

witnesses *duces tecum*. The Court declined to order these subpoenas, unless counsel would state in advance what he expected to prove so that the Court might see that the evidence was relevant and competent. This counsel refused to do; and as a matter of principle stood upon his constitutional rights, and because the demand was unauthorized.

Defendant was convicted on all counts, except the Seventh. The indictment will show that if there is a single violation of the Espionage Act by any of the articles published, it was that embraced in this count. It was a Resolution by the Grand Army of the Republic at Macon, Missouri, condemning, in strong terms, the Conscription Act, and if defendant was guilty on any counts, he was certainly guilty on this, and it only shows the character of such laws, that an exception was made in favor of a powerful organization.

The careful attention of the Court is asked to these articles. Anarchy, lawlessness and violence is suggested in none of them. They are articles, in the main, as Washington and Jefferson would approve—possibly not approving all the sentiments. One was by Mr. Bross Lloyd of Chicago, said to be a large owner in the Tribune, a man of large wealth and the article was copied from the Chicago Examiner. It was not of a very dignified character, it is true; but neither the writer or publisher have ever been prosecuted.

The defendant, being convicted on all the counts

except the Seventh, was sentenced by the Court (he being an old man 54 years of age), *to ten years imprisonment on each count*, to be served at the same time.

In due time, and formally, the defendant sued out his Writ of Error and the case is now pending here on the Demurrer and Motions and other matters of record proper, without a Bill of Exceptions. Time was given to file the Bill, and was afterward extended; none was filed, for the reason that none could be procured. The following are the facts, which, of course, rests only upon this statement, and can be taken by the Court, or entirely rejected, as the Court sees proper.

Counsel prepared a Brief, *in exact accordance with the wise and humane rules of this Court* with one possible exception. It first set out the Demurrer and the Motions. This, if unnecessary, was *the only specific* objection ever suggested by the Court. It next sets out accurately, and in narrative form, *all of the testimony of each and every witness*. There is absolutely no conflict whatever between the testimony on the part of the Government and of the defendant—except upon an immaterial matter, as to whether defendant was the editor of the paper, or merely an editorial writer. The evidence was simple, easily remembered and stated, and, outside of defendant's specific objections, could all be put on one page, or two at most, to an intelligent understanding of the facts. Defendant was not the

editor, publisher, owner or distributor of the paper. All the evidence showed this, except a witness testified he said he was editor when all else showed he was only a writer. Gleeser occupied all these positions. The Defendant was an editorial writer, had no power to put anything in the paper, or keep it out; wrote articles; tendered them to the editor; who accepted them, rejected them or changed them, and received the small sum of \$40 per month and a commission on the advertising he secured. *This contract was made before declaration of war in Europe*, and continued down to the time of arrest. There was no sufficient evidence that he wrote the editorials *just as printed*; but being unable to point out the changes made, he frankly accepted responsibility for them. There was no evidence of a conspiracy, except that afforded by the relation of the parties, and the facts aforesaid, and defendant insisted this was none whatever, since the relation commenced before the war, and the overt acts, as pleaded could neither aid the conspiracy charged in pleading or on proof.

The Bill of Exceptions next set out in full the charge of the Judge, which was on his insistence,

All the matters as to the Bill of Exceptions were entirely by correspondence, and if the means of the Defendant will permit the letters of the Judge, and the replies of his counsel, will be printed and exhibited to the Court, together with the Judge's original letters, as having a direct bearing

upon the legality of this law, by showing the manner in which it is enforced.

The Bill of Exceptions as prepared was tendered to the United States Attorney, with the request that he would point out any inaccuracy, either errors in statement or omissions if any existed. *He refused to even examine it*, and demanded that the stenographer copy the entire proceedings from his notes. The Bill was then sent to the Judge, with the same request. He failed to point out any objection, except that the demurrer and motions should not have been embodied in it. This may be true, but it did no harm. Though asked respectfully to point out any error in the testimony, or in other respects, he failed to do so. He finally said it was not correct and he would not sign it, but did not point out the inaccuracies so that the defendant might correct it to conform to the facts, if not correctly stated.

The Judge then prepared a Bill of Exceptions, as he called it. It also set out some of the motions, but left out the most material—after saying that none should go in. As to the evidence *he set out none whatever*, but said there was evidence tending to prove all the charges as made by the indictment. This charged that the defendant edited, prepared, published and circulated the paper together with Gleeser. The Court upon defendant's insistence instructed the jury that if he did not do all these things, they would find him not guilty on the second

and subsequent counts. *There was no such evidence* in the entire case, and this was one of the main points arising on the appeal. The Judge, however, decided the matter by his Bill.

The entire charge was put in his Bill also. Defendant insisted that charge had been revised as delivered, but stated he had no objection to the revision, and the Judge might revise it again if he desired. This Bill was left with the Clerk; defendant insisted that his Bill be also left with the Clerk, which was done, and he asks if it can be done under the practice, that the Clerk be directed to send them both up.

It should be further stated that on the demand of the United States attorney and the judge that the entire evidence should be written out, he gave the order to do so to the stenographer. He demanded \$250 of the defendant, who is a very poor man, and which was exorbitant. He paid him \$100 and the stenographer had never written enough, with all the irrelevant matters put in to consume the \$100 when the time, as extended, expired. So that Defendant was unable to comply with this demand, which was in direct violation of the rules of this Court, and repeated decisions. One stenographer left on a visit, and the other claimed that nearly all of his time was consumed in public matters.

The plaintiff in error in this Court duly filed a statement of the points he shall insist upon in the argument. To these he refers the Court. And

though not stated in the exact order, they constitute, substantially, the grounds as set forth in the demurrer and the other record proper and also in the Assignment of Errors.

These in substance are as appears under the next heading.

(2) A SPECIFICATION OF THE ERRORS RELIED ON.

First: That the sections of the Act of June 15, commonly called the Espionage Act, are unconstitutional, for the reason that under the original Constitution Congress has no power over Speech and Press, and by the First Amendment all such power is positively forbidden.

Second: That other parts of the Act, not herein directly involved, are made treason by the Constitution, and being so made by the Constitution, they cannot be made a less grade of offense or any other offense by Act of Congress. And all are so connected all must fall.

Third: That the sections of said Act June 15, 1917, on which the indictment is founded do not prohibit *all statements*, and *all reports*, criticising the Government, but only such as are *false* and made with a criminal *intent* therein declared. The Indictment fails to charge any of the ingredients of the offense.

Fourth: That the section of the Act, on which the indictment is founded, has been REVISED—not REPEALED—and incorporated into the Act of May the 21st, 1918, thereby becoming a part of a new law, which is the last expression of the Legislative will, and at the time of trial, and now is, the only law on the subject. And having no saving clause, all prosecutions fall, and are not continued by the 13th Section of the Practice Act, which only applies where the law has been REPEALED.

Fifth: A demurrer tenders an issue of law; *not fact*. Therefore, while pending, the Court has no power to take any action looking to a trial on an issue of fact, which is not pending. Hence the Court committed error in ordering a venire for a jury while only a demurrer was pending. Defendant was entitled to his day in Court of which he was deprived by this order. The Court, by this action declared as plainly, as if by words, that the demurrer, unheard then, would be overruled.

Sixth: Defendant had a Constitutional right to a trial; this implied a reasonable time to prepare. Of this he was deprived by being required to go to trial the next morning, after a decision late in the evening, *and at once*, after a plea of not guilty.

Seventh: He had the right to compulsory process for witnesses. This was denied, unless he would state in advance what he would prove.

Eighth: He has also the Constitutional right

to an impartial hearing, both upon the law and facts. This was denied him by the judge hearing a long oral argument, and immediately deciding the questions argued in a long typewritten opinion, *prepared in advance*.

Ninth: The Indictment, and neither count thereof, states any offense.

(A) It is necessary in charging a conspiracy to set forth the unlawful agreement, stating "the time, place, scope and object of the alleged agreement and conspiracy." This the first count fails to do, and only charges an agreement, *with no statement of its terms*, to violate the statute described by its title, and fails to state, *how and in what manner it was to be violated by the conspiracy*.

(B) That the statute only makes criminal *false* statements or *false* reports made with the *criminal intent* therein alleged. The Indictment and each count fails to allege matters necessary, in this respect, to constitute the offense.

(C) No person can be twice put in jeopardy. This was violated. The overt acts in the first count, which are necessary to be both alleged and proved to constitute the offense, *are the same publications* as are separately stated in the second and subsequent counts.

(D) None of the articles are criminal under the statute. They are all proper comments upon

important events, of great public interest, and are legal under the Constitution, *and even under the Act of June 15, 1917*, and if any are erroneous.

Tenth: The punishment is cruel, unusual and excessive, being ten years on each count—concurrently it is true. As an example, one article simply contains a short letter from a subscriber, saying he is pleased with the paper, renews his subscription, and asks that two back numbers be sent him. *There was no allegation that these back numbers, were sent; or that they contained anything objectionable.*

(See the above, set out in full, page ——— Printed Record.)

(3) BRIEF OF THE ARGUMENT.

IMPORTANCE OF THE CASE.

A greater question never has, and, in the nature of human government, never can come before an earthly tribunal than the main question presented. When we consider the influence of *the decision to be made on the future of the United States*, and the destiny of millions yet unborn, counsel stands appalled at both its magnitude and his own lack of ability to present it as its great importance demands both now and for the future. And yet on this question, stripped of every outside influence which now prevails and sways the judgment of men, one of the

greatest embarrassments in the argument is the exceeding simplicity. So plainly is this true, if the Constitution is to remain as the supreme law of the land, as said by Ex-Senator and Ex-Attorney General Crittenden, elsewhere set out, discussion and attempted illustration *but obscures a question which is perfectly plain.*

THE MAIN QUESTION IN THE CASE.

Were those who framed the Constitution and who solemnly declared in Convention that they gave no power over speech and press wrong in their views of what they actually did and intended to do?

Were the people who, for greater security, immediately passed the First Amendment, and as they understood its import, wrong?

Were those who mainly had framed the Constitution and adopted it and who, under the lead of Jefferson and Madison, founded a great political party known as Republican or Democratic, (and in order to overthrow a party who had asserted this power), and who founded it on the cornerstone *that Congress had no power to legislate in any case on speech and press*, wrong on this question?

Were all parties, and all factions and people from that day, together with both the legislative and executive branches of the government, wrong in asserting that no such power existed?

In brief, has all American history and policies down to 1917 been wrong?

And now, after more than a century of error on the part of all, did the 64th Congress and the President in 1917, set the compass aright and get the ship of state, that had guided our destinies from thirteen feeble States along the Atlantic until they had spread over the continent, put the United States as last, on the right course?

THIS IS THE GREAT QUESTION NOW UP FOR DECISION, AND WHICH COUNSEL SHALL EXERT EVERY POWER HE POSSESSES TO PREVENT BEING OBSCURED BY SIDE ISSUES. On its right decision depends the future destiny of this people and government, for, as said by Erskine, hereafter quoted, "*Other liberties are held under government, but the liberty of opinion, keeps governments themselves in due subjection to their duty.*" And no other power can so keep them, as the house can only rest upon the foundation.

The Dartmouth College case; *Cohens v. Virginia*; *McCulloch v. Maryland*; The Passenger and the License Cases; the Dred Scott Case; the Legal Tender Cases, shook the very foundations of the Republic. Yet by comparison all these cases become insignificant. For the Constitution and Union would probably exist on a decision either way, in any one or all of these cases and in some of them better in the view of some. Nay it may be truthfully said that even the great question of the Civil War and Secession, are insignificant, because an adverse decision upon those measures would only have left two separate federal unions (as was the

prevailing opinion when formed except for expense) to again be drawn together by those influences which prompted the first and second Union.

But what of this question? If Sovereignty is in the people and rulers but their agents, then the right of the people to discuss all public questions of government is indispensable to such government. For, as said by De Tocqueville (*Democracy in America* 1, Page 195), "The Sovereignty of the people, and the Liberty of the people may therefore be looked on as co-relative institutions, just as a censored press and universal suffrage are two things, which are irretrievably opposed, *and which cannot long be maintained among the institutions of the same people.*"

So as to the right of free discussions—"either just or unjust" as said by Mr. Jefferson—of the government and of its officers, if it does not exist, *then we go from a government resting on "The Consent of the governed" to one of absolute power,* and absolute form where the people have *no vested rights but only privileges* such as rulers concede to them. This is evident, for the right to put forth opinions, which rulers and kings deem to be "just" must also include the right to opinions, which the same persons may deem "unjust". Measures may be unjust, unwise, oppressive, even illegal, and if the people can not discuss and point out all this, on the part of those in office, then there remains no means by which these abuses can be reformed, and

they must become permanent destroying this and all other republics. Again few men will advance opinions, when they unlock doors to prisons, as those in power may decree them unjust; and it is axiomatic that where all opinions can be expressed the pure grain will be separated from the chaff; (if not republican cannot exist); or as said by Mr. Jefferson, error is harmless where truth is left free to combat it. And where freedom of opinion does not exist then that condition is brought about as described by Gibbon when Augustus had destroyed all Roman liberty.

“By declaring themselves the protectors of the people, Marius and Caesar had subverted the Constitution of their country.

“To resume, in a few words, the system of the Imperial Government, as it was instituted by Augustus, and maintained by those princes who understood their own interest and that of the people, it may be defined an absolute monarchy *disguised by the forms of a commonwealth.*” Decline and Fall of Roman Empire by Gibbon, Vol. 2, Chap. 3.

CAUSE ADVANCED.

A motion was made by the Government to advance this and other cases, and was sustained. No grounds for advancing the causes were stated beyond saying they all involved a certain question. The motion showed the defendants out on bail. The order left but about two weeks under the rule to

prepare a brief. The time was inadequate in view of the question, and this lack of time must excuse any imperfection in the brief. The Defendant suggested why the cases should be postponed until after peace. These suggestions, he is informed, did not reach the court until after the order. As no reasons to advance were stated, it is apparent that none existed, and that no interest of the Government, required a speedy hearing. It has been suggested that a decision now, if it sustains the law, will prevent a free discussion of the approaching peace negotiations, which are of the greatest importance, as it seems to be understood the United States, are now, for the first time, entering into a treaty affecting questions, which alone concern European nations. Whether this suggestion is well founded or does an injustice to those at the head of affairs, it is very evident that such a decision would hamper and prevent that free discussion of this measure so essential to our future happiness and liberty.

In any event the most cogent reasons will suggest themselves to all, that this overshadowing question, of the power of Congress over Speech and Press should not be presented for final decision under conditions now existing.

LICENTIOUSNESS OF PRESS.

THE COBWEBS WHICH HAVE OBSCURED THIS QUESTION AND ESPECIALLY IN THE UNITED STATES UNDER A WRITTEN CONSTITUTION MUST BE FIRST REMOVED.

During the existence of the Sedition Act it was claimed, that the liberty of the press did not protect the *Licentiousness* of the press. It is now unnecessarily so claimed. It has been so claimed in all ages, by those who advocate Sedition and Espionage Acts. It was also always claimed by these advocates in England. As said by Mr. Buchanan, set forth elsewhere, "*It has been the pretext in every age, by every tyrant who sought to demolish its freedom.*"

Who, with any intelligence, ever put forth the claim that Licentiousness was protected? Daniel Webster vociferated, and deluded a whole section by exclaiming "We, the people," "It is the people who adopted the Constitution." Now, no one *ever questioned that it was the people*, and, second, as the Divine origin of Government was not claimed, *no other source was left but the people*. But the whole people of the United States, as a body politic, then had no existence (never had, and do not now) and *no power to confer*. Did then these people as a whole bestow the great powers found in the Government—did those who did not have this power bestow it? Or did the people of the several States, who composed the body politic and possessed all the powers afterwards conferred, delegate to the United States

a part of the powers that they then possessed? *This was the real and only question.* It is answered by the fact that *no other people* possessed the powers to confer. Yet, Mr. Webster became the "Great Expounder," and Judge Story became inspired, in the estimation of one section, whom they made believe *this transparent impossibility.*

It is precisely so in this case. And men in high positions repeat "Liberty of Press is not Licentiousness of Press." These men fall back and claim to think that they have said something wise; whereas, in truth, they have said something without meaning and what is *far worse*, with absolutely no relevancy to the question. No intelligent man claims that Licentiousness of the press is protected, or becomes lawful under clauses protecting *the freedom of the press* by Constitutions. The natural rights of one man in no respect, involve the right to invade the rights of others. All those who *oppose* Espionage bills, and those who *support* Espionage bills *stand perfectly agreed on the proposition* "That liberty of the press is not Licentiousness." *On that admission this entire Brief proceeds.*

The parties *divide* upon the following proposition:

First: Those who oppose laws over the press by the United States assert, that the General Government *has no power whatever*, to punish even licentiousness of the press; *or to pass any law on the subject.* Those who *support* these laws maintain the

contrary, and that the United States has the power to punish licentiousness of the press.

Second: Those who *oppose* these laws assert, that any and all discussion—"just or unjust"—wise or unwise, correctly or incorrectly, of all public matters, are not guilty of Sedition or Licentiousness. In other words, if the Government takes action upon any matter, it is not, and cannot be Sedition or Licentiousness to discuss this public action, or attempt to show it is unwise, unauthorized or unconstitutional; and that every citizen does not discuss these matters with a prison door open before him, to be closed on him as a felon, if his discussion is unsound, since this risk would prevent all discussion of every public measure, thus making a Republic impossible of existence, and erecting in fact, whatever it may be in name, an absolute Government.

To illustrate this point, Congress has power to declare War. In time of peace, any citizen may discuss the advisability of declaring war, and urge it, even though he does so unwisely. Why may he do this? The answer is, because this is a Government by and of the people, and the declaration of war is *a lawful and legitimate measure by Congress*. Again, Congress, or rather the President and the Senate, may enter into a treaty, when war exists, to end the war and bring about peace. Therefore, any citizen, even in war, may advocate the exercise of this Constitutional power, and that peace be made,

unless wars are to be perpetual, peace must be made at some time by treaty. In advocating peace he may act unwisely, *but has he a right to do so?* The answer is, that it is a lawful measure he urges, and it can never become Sedition or Licentiousness, *unless it is Seditious to advocate the exercise of a lawful and Constitutional power.* And, as interpreted by the Court, *it is Licentiousness to urge upon Congress a perfectly lawful measure.* And this very defendant has been sentenced to spend ten years in prison for suggesting—not urging in mild and proper language, that an effort ought to be made to bring about peace.

There you have the Espionage Act.

On the other hand, the *advocate* of such laws maintain that such discussion is Licentiousness; and may be punished. That is exactly what the present Espionage Bill attempts to do; that is the scope and effect of all such laws. Hence their natural tendency is destructive of our Constitution; hence repugnant to it.

In brief, to criticise *adversely* the conduct of public officers, and all public measures, and to advocate different measures, authorized by the Constitution, is of the very essence of a Republic and can never be "Licentiousness" and made a crime. And it is as fully protected as to *approve* the course of officers and of measures. Espionage Bills seek to make the first illegal, and therefore strike at the basis of our Constitution.

The Compiler of this Brief composes it upon one of the above theories. He will meet these propositions, and will try in doing so to avoid all ambiguity, and everything that shall cloud these questions. Let the learned Counsel for the Government meet these questions, in a like spirit, and also attempt no mystification. For however amplified and illustrated these are the propositions advanced and sought to be maintained, by this Brief.

In like manner, let this Court squarely meet and decide these questions. Let them not be evaded. And if they are unsound, let the American people be plainly told *by the Court wherein*, Without any reflections upon this Honorable Court and its members, Chief Justice Marshall, notably in the Dartmouth College case, in *Cohens v. Virginia*, and in the *McCulloch* case, did not always do this. Occasion does not call for a demonstration of this fact, as could be done. But let it be said in a few words, in the first case he wrote *out of the contract* (if a Charter is a contract) one obligation of a contract, and he wrote *into it* another, that did not exist. In the next case, he said truly that the Court had no power to take from the jurisdiction of Federal Courts, as prescribed by the Constitution. But he did *add to* that jurisdiction by omitting words from the Constitution, which excluded jurisdiction in that case. In the last case, by interpretation, he struck out two material words "necessary," and also the conjunctive "and," and he substituted two other

words "appropriate" and also the disjunctive "or." Thus, did Chief Justice Marshall, who was a member of the committee of the Virginia Convention, which wrote the Resolution, ratifying the Constitution by that State, adopt a different Constitution from that he ratified.

So let these questions, stated above, *be squarely met* by all, that the people now may understand their fate; *submit to it, or change it by lawful Amendment.*

Let this question of Licentiousness and Freedom of the Press be presented in another form. If any person should reflect upon the character of Mr. Wilson for honesty, integrity, or in other respects, *as an individual*, he may sue under the laws of the State, in the proper Court, for damage. In some cases, the words may be even criminal under State laws. But on the other hand, if any citizen, orally or in writing, says that any of his acts, *as President*, are illegal, unwise, oppressive, or unconstitutional, and attempt to show this, this is not *Licentiousness*, even though the argument may be unsound or unfounded. But the Espionage Acts, as construed, make it so. To so discuss is the right of every citizen—his words should be temperate, and as far as possible true; but even though unjust and unfounded, *they cannot be made a crime, unless the very foundations of the Republic are destroyed.*

Then let this question be met and decided, *and not something else.*

To repeat that it may be not misunderstood—the great question is, has Congress any power over the subject whatever. It is in no sense:

The extent of a lawful power.

It is in no sense (except in a subordinate view if Congress has power over the subject) Licentiousness of the Press.

Next if it be conceded Congress has power then can it make a crime and Licentiousness, the discussion of any matter, vested in the United States by the Constitution?

And let the Court ever remember—reverently and with a full sense of the responsibility—this decision *is for all time*. No words can fully and aptly describe its heighth, depth; compass and influence on our future destinies of the decision.

It is useless to ask that the heated temper of the present, which arouses the passions and clouds the judgments be excluded. That should be apparent; yet it is also apparent, that this cannot be done—for all men “made under the law” are subject to those infirmities inherent in Adams race. So it is this case, and other cases involving a like question should have rested, to a more convenient season.

FREEDOM OF SPEECH AND PRESS.

FUNDAMENTAL PRINCIPLES INVOLVED.

I ASSERT THE FOLLOWING PROPOSITIONS.

FIRST:

THE CONSTITUTION OF THE UNITED STATES IS THE SUPREME LAW OF THE LAND—AT ALL TIMES AND IN ALL PLACES OVER WHICH THE UNITED STATES HAVE JURISDICTION.

SECOND:

THAT THE GOVERNMENT OF THE UNITED STATES IS A GOVERNMENT PROPER WITH NAMED AND SPECIFIED POWERS. WITHIN THESE POWERS IT IS SUPREME OVER PEOPLE, RULERS, AND BETWEEN THE STATES; OUTSIDE OF THESE POWERS IT HAS NO EXISTENCE WHATEVER.

But for the contentions now prevailing, an apology would be due the Court for any attempted elucidation of principles so well established. The great, or perhaps the only obstacle to a clear presentation of this question is that, first, men of responsibility and position deny that the Constitution is the supreme law of the land in war. The self-evident and palpable error is asserted that the war suspends the Constitution. That is that this power, given as are all others, to preserve the Constitution destroys it.

Second, it is claimed by the same parties that the government of the United States is not only a

government proper "within the named and specified powers" but that in war *it is a government whose powers are unlimited*. That the "war power" so-called suspends all others.

It is a sad commentary upon the times that it is necessary to expose these errors, and to establish the true doctrine. And it may be further remarked, that the state of public feeling which makes these conditions possible, also makes it almost impossible to combat and refute them. In fact if these views did not prevail an attempted restriction of the exercise of the power of Speech and Press, by congress, would not be seriously advocated by anyone.

The positions announced in this Brief upon these questions have been repeatedly decided by this Court, but there is something even higher authority than the decisions of the Supreme Court. It is the *unquestioned historical facts*. To both historical fact and legal decisions, we appeal, since they both are in accordance with the principle we assert, that the Constitution of the United States is the supreme law of the land, *at all times and under all circumstances*; and next, that it is a government proper, and the Constitution is supreme within the prescribed limits and out of those limits has no existence whatever.

(1) HISTORY OF ORIGIN OF THE GOVERNMENT.

First Condition.

The original thirteen States were colonies, each

existing by a separate and distinct charter or ordinance. Each was subject to the English king, but there was no legislative union. Parliament claimed the right "to legislate for the colonies in all cases." This the colonies denied, and largely out of this arose the revolution. (Madison's Report, 4 Elliot Debates 562.)

Second Condition.

By the *mere act* of revolution each state became free, sovereign and independent of England, and of each other. The Declaration of Independence *simply gave notice* of an existing fact as said by Adams and gave notice of the causes which implied the separation. "*On the happening of the revolution* all the transcendent powers of Parliament descended to and vested in the people of New Hampshire." Chief Justice Marshall--Dartmouth College case:

"The people of that country (Virginia) were the genuine source of all power. This abolition of the old government, and this establishment of a new one, was the highest act of power any people can exercise. In June, 1776, the convention of Virginia declared it was a free, sovereign and independent state; afterward, July 4, Congress declared the thirteen United States, free and independent states. I consider this as a declaration, not that the United States jointly, in a collective capacity, were independent States, but that each of them was a sovereign and independent State; that is,

that each had a right to govern itself by its own laws, without any control from any other power upon earth." Supreme Court Justice Chase (a signer of the Declaration of Independence), 3 Dallas, page 225:

"Every particle of authority, which originally resided either in Congress or in any branch of the State Government, was conveyed by each body politic separately, and not by the people of the several provinces or states jointly." Justice Iredell, *Penhallow v. Doane*, 3 Dallas, 92. (Read this great and profound case).

"It has been said they" (i. e., the States before the Constitution "were sovereign and were connected only by a league. This is true," Chief Justice Marshall, *Gibbon v. Ogden*, 5 Peters 565.

In the Treaty of Peace each State by name was acknowledged to be a "Free, Sovereign and Independent State." The first Commissioners of Great Britain authorized them to treat with the "Commissioners of the United States." These last refused to so treat and a new commission was issued to English Commissioners authorizing them to treat with the commissioners of New Hampshire, and so on, naming all. In their first constitutions each declared itself a "free, sovereign and independent State." "That the people of this commonwealth have the sole and exclusive right of governing themselves as a *Free, Sovereign and Independent State*. (Original Constitution of Massachusetts, I Poore's Constitution, pp. 956-7.)

“The people of this State being by the Providence of God, Free and Independent, have the sole and exclusive right to govern themselves, as a Free, Sovereign and Independent State.” (New Hampshire—1 Poore’s, p. 138.)

“The people of this State, being by the providence of God, free and independent, have the sole and exclusive right, to govern themselves as a Free, Sovereign and Independent State—And this Republic is and forever *shall be and remain* a Free, Sovereign and Independent State, by the name of Connecticut.” (1 Poore, pp. 257-8.) So of all the other States.

Third Condition.

They formed a Confederation, *each expressly retaining its sovereignty*. In 1787 they met (except Rhode Island) in convention “*to revise*” these Articles. Each State was equal—Delaware, with a population not larger than Richmond, had the same voice as Virginia, the largest State. *We here get the starting point*. They framed a Constitution, and *that created a government* of all. Each State, having all just powers of government, for the good of all; they *divided these powers*. They put certain powers in the hands of this general government; in the words of Marshall for “all and by all.” They authorized this government to exercise all these powers—by legislative, executive, courts. They authorized it to exercise no other.

As to all other powers not so placed in this *ONE*

Government, each State separately kept, or "reserved" expressly by the Constitution to remove doubt. As to these last there was no change whatever in the former condition of the State. They remained as fully, separate, free, and independent as before. New States came in on a perfect "equality" with the old.

Is not the above an accurate recital of this important history? If so, then those who assert a power in the General Government over Speech and Press must show when the States parted with it.

(2) COURT DECISIONS.

We now turn to Court decisions.

"The question, whether an act repugnant to the Constitution can become a law of the land, is a question deeply interesting to the United States; *but, happily, not of an intricacy proportioned to its interests.* It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

"The people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established are deemed fundamental.

And as the authority from which they proceed is supreme and can seldom act, they are designed to be permanent. This original and supreme will organizes the government, and assigns to different departments their respective powers. *It may either stop here or establish certain limits not to be transcended by those departments.*

“The government of the United States is of the latter description. The powers of legislation are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested that the Constitution controls any legislative act repugnant to it; or, that the legislature may alter the Constitution by an ordinary act.

“Between these alternatives there is no middle ground. The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts and like other acts is alterable when the legislature shall please to alter it.

“If the former part of the alternative be true, then a legislative act contrary to the Constitution, is not law; if the latter part be true,

then written Constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

"Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the Constitution is void. * * * Those, then, who controvert the principles that the constitution is to be considered in court as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution and see only the law. *This doctrine will subvert the very foundation of all written Constitutions.* It would declare that an act which, according to the principles and theory of our government is entirely void, is yet in practice, obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act notwithstanding the express prohibition is in reality effectual. It would give to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits and declaring that those limits may be passed at pleasure." *Marbury v. Madison*, 1 Cranch, 176-7-8.

Every pretext of a suspension of the Constitution in war disappears in the simple, clear and unanswerable logic of this decision by the great Chief Justice.

The second case is by that eminent and upright

Chief Justice, whom the abuse of the hour, when civil war prevailed, could not turn from the path of legal duty; for like the granite hills of New Hampshire, or Gibraltar itself, the waves of public excitement broke harmless at his feet, and today he stands forth like a colossal figure unmoved by the passions of war, in our judicial history. I mean of course Chief Justice Taney. His learning was profound and his moral courage equaled his learning. With him to see the law was to declare it. To him may justly be applied Rufus Choate's tribute to the celebrated Chief Justice Shaw—"The Constitution is safe in his hands."

During the Civil War Congress passed an Act requiring a license to trade with any part of a State in resurrection and putting the control under the Secretary of War. For a violation the goods were to be forfeited in proceedings in the District Court. One Carpenter's goods were so forfeited and the case went to the Circuit Court at Baltimore and was decided in 1863 by Chief Justice Taney.

"If these regulations had been made directly by Congress, they could not be sustained by a Court of Justice, whose duty it is to administer the law according to the Constitution of the United States. For from the commencement of this Government to the present day it has been admitted on all hands and repeatedly decided by the Supreme Court, that the United States has no right to interfere with the internal and domestic trade of a state. They have no

right to compel it to pass through their Custom House, nor to tax it. This is so plainly set forth in the Constitution, that it has never been supposed to be open to controversy or question. Undoubtedly the United States authorities may take proper measures to prevent trade or intercourse with the enemy. But it does not by any means follow that they disregard the limits of all their own powers, as prescribed by the Constitution or the rights and powers reserved to the States and the people.

“A CIVIL WAR, OR ANY OTHER, DOES NOT ENLARGE THE POWERS OF THE FEDERAL GOVERNMENT OVER THE STATE OR THE PEOPLE BEYOND WHAT THE COMPACT HAS GIVEN TO IT IN TIME OF PEACE. A STATE OF WAR DOES NOT ANNUL THE TENTH ARTICLE OF THE AMENDMENT TO THE CONSTITUTION, WHICH DECLARES THAT ‘THE POWERS NOT DELEGATED TO THE UNITED STATES BY THE CONSTITUTION, NOR PROHIBITED BY IT TO THE STATES, ARE RESERVED TO THE STATES RESPECTIVELY, OR TO THE PEOPLE,’ NOR DOES A CIVIL WAR, OR ANY OTHER WAR, ABSOLVE THE JUDICIAL DEPARTMENT FROM THE DUTY OF MAINTAINING WITH AN EVEN AND FIRM HAND THE RIGHTS AND POWERS OF THE FEDERAL GOVERNMENT AND OF THE STATES, AND OF THE CITIZENS, AS THEY ARE WRITTEN IN THE CONSTITUTION, WHICH EVERY JUDGE IS SWORN TO SUPPORT. Upon the whole, the Court is of opinion that the regulations in question are illegal and void and that the seizure of the goods of Carpenter, because he refused to comply with them, can not be sustained. The judgment of the District Court must, therefore, be

reversed, and the goods delivered to the claimant, his agent or proctor."

(This case cannot be had in Kansas City. It is copied above from Mr. Davis' *Rise and Fall of the Confederate Government*, Vol. 2, p. 348.)

The next case I shall cite is the decision in *Ex parte Milligan*, 4 Wallace by Mr. Justice Davis. In my judgment it is perhaps the greatest single passage ever uttered by this exalted court. It deserves to be engraved in marble, and, more enduring still, in the hearts and views of a great free people, should they virtuously heed its admonitions.

"THE CONSTITUTION OF THE UNITED STATES IS THE LAW FOR RULERS AND PEOPLE EQUALLY, IN WAR AND PEACE, AND COVERS WITH THE SHIELD OF ITS PROTECTION ALL CLASSES OF MEN, AT ALL TIMES AND UNDER ALL CIRCUMSTANCES. NO DOCTRINE INVOLVING MORE PERNICIOUS CONSEQUENCES, WAS EVER INVENTED THAN THAT ANY OF ITS PROVISIONS CAN BE SUPERSEDED DURING ANY OF THE GREAT EXIGENCIES OF THE GOVERNMENT. SUCH A DOCTRINE LEADS DIRECTLY TO ANARCHY OR DESPOTISM. BUT THE THEORY OF NECESSITY ON WHICH IT IS BASED IS FALSE. FOR THE GOVERNMENT, WITHIN THE CONSTITUTION, HAS ALL THE POWERS GRANTED TO IT WHICH ARE NECESSARY TO PRESERVE ITS EXISTENCE, AS HAS BEEN PROVEN."

Counsel is not invidious, and yet may we not drop here a passing word. In no case, perhaps in no court, was greater political influence brought to

bear than in this case, to prevent the decision that was made; two judges who concurred in that opinion, one the distinguished justice who rendered it, were appointed by President Lincoln. And they were called upon in this decision to pass upon the legality of one of the most prominent acts of the President, by whom they were appointed. They were called upon to decide whether or not he had acted in this, and in numerous similar cases, in accordance with the Constitution or against it; and they decided it according to the law, as every honest man knows now they did. It requires something of the like courage to decide the present case with the powerful influences which now control our public destinies—influences which are sufficient to cause a Democratic Congress to pass a law overturning the very cornerstone upon which that party was founded by Jefferson and his compatriots; a measure demanded by the President elected a Democrat and which has been enforced in many cases with extreme cruelty. May I not invoke Divine aid that equal independence may be shown.

Having now by a plain statement of the historical facts, and also by these decisions, established that the Constitution of the United States is the supreme law of the land, in both peace and war, we now turn to another view of that matter from the provisions of the Constitution itself.

Third. *The Constitution is the supreme law*

of the land at all times—in war no less than peace—by its own terms.

1. *It so declares itself to be.*

We are not compelled in determining the true meaning of the Constitution by conjecture, or to ramble through the mists of darkness. *Its language is plain.* In fact it is doubtful whether another paper equally clear was ever written. What does the Constitution mean in any case? The first rule is we go to the Constitution itself, and in the words of Webster ask "What does it say of itself." It declares:

"This Constitution, and the laws of the United States which shall be made *in pursuance thereof*, and all treaties made or which shall be made under the authority of the United States, shall be *the supreme law of the land.*" And it is supreme if not ruthlessly set aside. Who has authority to change it? Who in authority *dare change it*; and who can change it without a violation of a sacred oath? The only question that might be raised is what is the construction of the words "*the law of the land*," over which it is the supreme law. In an early case, Chief Justice Marshall said, the land was the States and their territories. It needed no judicial decision for it was without limitation as to territory except that it could not extend beyond the sovereignty that adopted it. So that, as to place, it extends throughout the United States; and, in fact, such is the ex-

press declaration of Article VII, which provides "The ratification of the Conventions of Nine States shall be sufficient to establish this Constitution *between the States so ratifying the same.*" So that it is the supreme law of these States as to all matters committed to it, or of all the territories belonging to the several States, and the common territory of all. Such are its terms; and we ask again, *who has any power to limit it; to suspend it, either to territory or subject matter, except its own limitations.*

2. Next, *What are its limitations as to time?*

The answer is: *There is no limitation by the provisions in this respect.* And who, sworn to support it, has any right to incorporate into it, limitations in this respect? Who, for instance, has power to say, having sworn to support it, to qualify that oath and declare that it is the supreme law in peace, but it is not the supreme law in war; or in war that those in office are released of their oaths?

The late Kaiser, in his formal abdication, releases all "his soldiers and officers of their oath of fealty" to him. In the United States let us hope we have no Kaiser. But we have a *King*. It is the Constitution. It requires an oath of loyalty and support from all officers. Where is the provision that suspends and annuls this oath in either peace or war?

Light may be thrown upon this by asking this question: Why was power given to Congress to raise armies and to declare war? The answer is

plain. That, like every other power, *it was to preserve the Constitution*. No power is given by the Constitution to destroy the Constitution or any clause of it. Yet men arise in our day who have sworn to support that Constitution, and proclaim that that Constitution is suspended, which alone gives them power; and they then point the finger of scorn and contempt to the anarchist who would break down the structure. What is the direct effect of their own course? Let us ask, what do each of these propose to do? The answer is, that one *has power* to destroy, while the other has no power. Let us hope that the last will ever remain as insignificant in number as they are in character, and that this Court will hold the former to the Constitution. For such purpose the Court was created.

This is a government of law. Liberty is secured by law, and that law is the Constitution of the United States, and woe be to he who seeks to pluck from the written page, any of its great guarantees, or to say that it is not the blessed heritage of the American people and their posterity now in war and for the future.

3. It next declares what the powers of the three branches of the government are. Article I, Section 8, declares "The Congress shall have power." It then proceeds to specifically name those powers so delegated. If the power to suspend the Constitution in war by either the Congress or the President, exists it is found in the enumeration. *It*

is not so found, and if exercised it must come through usurpation of power and a violation of oaths. It is plain therefore that no power whatever has been delegated to any officer, or any branch of the Government, to suspend (except in one respect) any single clause of the Constitution.

4. Power is given to Congress (for it is found among its powers, and not those of the executive) to suspend the Writ of Habeas Corpus; but it limits carefully the exercise of this power, to the two cases of "rebellion or invasion." And then so careful is the Constitution, as to the suspension of this one clause, that it is not *in all cases* of rebellion or invasion that it may be suspended by Congress but only in those "where the public safety may require it." Article, Section

This power having been given to suspend one clause of the Constitution in a specified case, expressly excludes power to suspend the Constitution in any other case as clearly as if so stated in words.

5. It requires an oath of every public officer. It requires a specially binding oath of the President. "I do solemnly swear or affirm that I will, to the best of my ability, preserve, protect and defend the Constitution of the United States" Article II, Section 1.

Again where is the authority given to set aside oaths? Where for instance, is it given to the President in any condition to say that he will not "pre-

serve, protect, and defend the Constitution of the United States?" And if we go to the judicial officers of the State, they take an oath to decide all questions in accordance with the Constitution, without any limitation as to time, and expressly of any State law to the contrary notwithstanding. So that we would have this anomaly: if officers of the United States may suspend the Constitution, State officers may also suspend it; or, on the other hand, uphold it, while another set of officers reject it.

THE MOST DESTRUCTIVE DOCTRINE EVER PRO-
NOUNCED IS THAT THE AGENTS APPOINTED TO CARRY OUT
THE SUPREME LAW, AND SWORN TO DO SO, MAY SUSPEND
THE LAW WHICH ALONE CREATES THEIR OFFICE AND
VESTS THEM WITH ANY POWER.

To illustrate this last. If it was true, that war or the war power suspends the Constitution let us ask, by what right is this, the Supreme Court, now hearing this case? Its power to do so arises only from the Constitution as the supreme law "and laws passed in pursuance thereof." Let this matter, because of its importance be looked at somewhat further. The Constitution creates the Union of these States. *The Constitution is the creator, the union is the creature.* Can the mere *creature* suspend its *creator* and yet live on? We know, as pointed out elsewhere, the original States were once mere colonies. They became sovereign States, but there was no Union between them; each was separate and distinct. They formed a Confederation: it proved de-

fective and a Convention was assembled *to amend it*, that framed the Constitution. It was submitted to the States, and ratified by the States and as said by Chief Justice Marshall, in the *McCulloch Case*, stating an historical fact from these ratifications proceeded all of its authority.

IF THEN THE CONSTITUTION IS SUSPENDED, THE UNION ITSELF IS SUSPENDED, AND TOGETHER WITH THAT SUSPENSION ALL LAWS ONCE PASSED "IN PURSUANCE OF THE CONSTITUTION" FALL.

Then there is no Congress—no Senate, no House, no law making body, no power to make peace, though before the suspension of the Constitution war had been declared. There would be as in the present condition of Germany no lawful government authorized to make a treaty of peace with others.

Next there is no Executive to execute laws, for there are no laws remaining. Despotie or unrestrained power remains. Then there is no Commander in Chief of the Army to conduct war. This doctrine is not only the most absurd and unfounded, *but it is the most destructive that ever was uttered*; for even anarchy, should it break out, can be suppressed by the strong arm of the law. This last is the object and such the purpose of laws and of Government—to arrest and punish the lawless. In the event the Constitution, or any of its clauses, are suspended by war, then there is no law and no Government; nothing but the strong hand of power will be left.

We may here use the words of Mr. Justice Field—as great a Constitutional lawyer in my opinion as ever sat here—in describing conditions if State officers could be taxed. He said, “We risk nothing in saying that no one of the States under the form of Government guaranteed by the Constitution could long preserve its existence. *A despotic Government might.*” *Collector v. Day*, 11 Wallace, p. 126. The Constitution is not only the Supreme law of the States unitedly, but individually. What power has the General Government created as said in *White v. Texas*, to preserve the States, to suspend and take from them a part of their Constitution?

I wish on this point to quote briefly (and the quotation might be profitably extended) the Father of our country. Said Washington in his Farewell Address:

“If in the opinion of the people, the distribution or modification of the Constitutional powers be wrong, let it be corrected by an amendment in the way the Constitution designates. *But let there be no change by usurpation. It is the customary way by which free Governments are destroyed.*”

Such is the parting advice of George Washington. And let it be said in passing, what a commentary upon the claim now being put forth, that the Constitution is suspended, that this defendant was sentenced to ten years imprisonment for publishing an article which closed with the statement, that

if the Constitution was suspended in war, it could not be again revived in case of peace.

Washington says that any change or suspension of the Constitution is but usurpation. *Washington says it is the customary way by which governments are destroyed*, and if any further condemnation of this destructive bill and the doctrine claimed was needed, it is found in the fact, that this defendant repeated substantially the identical statement and warning of George Washington. To reverse that sentence he appeals.

IF IN WAR THE CONSTITUTION IS SUSPENDED, THEN WAR BECOMES PERPETUAL AND PEACE SELDOM, IF EVER, PREVAILS.

The government is one of limited powers. History, its provisions, and uniform decisions shows this to be true. If then the Constitution is suspended by war, or if what is vaguely termed the "War Power" is *absolute power over the people and States of the United States*, then every inducement is held out to Congress to declare war, and to the President, to conduct our foreign relations in such manner as will produce war, and not peace. For in peace their powers are very limited; and in war, if the Constitution is then suspended, their powers are absolute and unlimited. This would be a temptation to men too great and destructive to be given. If men were angels, such might be the Constitution; but then if men were angels, governments

would not be necessary, and wars would never occur. In framing a constitution restraints must be put on abuse of power. It is a new theory that a premium must be put on its abuse.

Does the intelligent student, who has read the history of the formation of our Constitution; who is familiar with the exceeding care taken to secure the liberties of the people, and to preserve the reserved rights of the States, believe that any such government was created as claimed if a suspension of the Constitution can exist? One of the reasons set forth in the preamble for creating this government was "domestic tranquility." Another "to secure the blessings of liberty." Neither of these objects could ever be accomplished, if our rulers became absolute, if they but declared war.

This doctrine is not only destructive and vicious, but it is downright absurd. Our ancestors sought to *preserve* liberty and peace. The power of war was given to these ends, to be used when all other means failed. They were not devising a plan the natural tendency of which was to bring about *a perpetual state of war*.

When the stream flows placidly within its banks, there is no necessity for the dykes. It is only when the torrent comes that these prevent the destructive flood from covering the land. It is in the storm that the rod above the house seizes the lightning and conducts it harmless to the earth. *It is precisely so with our Constitution.* When

peace and quiet prevail, then the government moves along harmoniously. It is in times of trouble and excited war that the people need the protecting shield of the Constitution. The power to declare war is not a weapon to be used against the people. It is a means of defence against wrongs that have been committed against them by another people. The power to declare war is not against the people, but it is a power by the people to declare war against others who have wronged them. By it they do not lose their liberty, or any single guarantee but it is the last resort by them to *preserve* the Constitution and liberty against a foreign foe. It is the most absurd and destructive doctrine of men to assert that when the Constitution declares itself to be the *Supreme Law* of the land, men, elected and sworn to carry out its provisions, may say *it is not the Supreme Law for any moment of time*. This claim did not arise in a house for the demented yet it might appropriately have so originated.

Yet this act, and almost every prominent act, is justified, not because it is "in pursuance of the Constitution" but because the Constitution is suspended and the war power is supreme. Of this very claim the Constitution is not the Supreme law. Ch. J. Marshall said: "This doctrine will subvert the very foundation of all written Constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet in practice, obligatory * * * It is

prescribing limits and declaring that those limits may be passed at pleasure."

Marbury v. Madison, 1st Cranch, p. 178.

If the Constitution is then not suspended, this alleged law must fall. This will be hereafter demonstrated. If the Constitution is suspended, it is an idle ceremony to discuss it. And we close this branch by saying that if courts have not the courage in times of great excitement, as the present, to affirm the Constitution as the living, vital, inestimable, supreme law, then it is also idle to discuss this act.

SECOND. THE GOVERNMENT OF THE UNITED STATES IS ONE OF SPECIFIED AND NAMED POWERS.

We now come to the second branch of the proposition, viz.: that the Government of the United States is one of named and specified powers only, that within these powers the Constitution and the Government are supreme; outside of these powers they have no existence whatever. In other words that as to these last, the States, united for the general and specified powers, are separate and distinct as are foreign nations, the one from the other.

By the Constitution, the powers of the government are defined. It is therefore limited. It takes certain powers, which had resided in the then States, and delegates them to a General Government of all and for all. It does not, as usually supposed by some, *delegate or give* any power to the

States. The States simply *reserve, each to itself*, all of its antecedent powers, they do not delegate to the agent or government of all the States.

This is the clear meaning of the original Constitution. But to remove all doubt, the Tenth Amendment was adopted, which constitutes "A General Bill of Rights" as often decided. (*Cruikshank* case, 92 U. S.) It declares: "The powers not delegated to the United States by the Constitution, or prohibited by it to the States, are reserved to the States respectively or to the people." Thus do we have the express statement that there is a division of power and all "not delegated" are "reserved."

"The first ten amendments *add nothing to the powers* of the Federal Government; they neither enlarge or restrict the rights of the States; they are in the nature of a Bill of Rights; special and specific as to some matters; *general by the Tenth, and all are restrictions on the United States.*" *United States v. Cruikshank et al.*, 92 U. S., 542.

We here ask the Court to note the statement that the first ten Amendments "add nothing to the powers of the Federal Government;" and the further statement "and all are restrictions on the United States" for this statement of both an historical and legal truth, completely demolishes one of the contentions put forward in defense of the Espionage Bill, as it was put forth in defense of its predecessor, the Sedition Law.

Next, the Constitution provides that "Congress shall have power." It then carefully names every power given and concludes with the general clause "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof." The meaning of this last clause is sought to be perverted. It is generally misunderstood although clear and will be explained hereafter.

But here we have the express declaration that "Congress shall have power" to do certain things, and it has no other power.

Article II creates the office of President, defines his qualifications; and then in Sections 2 and 3, expressly states what power he shall have and exercise.

Going to Article III, we find that the Supreme Court, as a part of the judicial system, is created. And it is provided expressly in what the judicial power shall consist; fixes and definitely defines the original jurisdiction of the Court, which can neither be increased nor diminished by Congress.

So that we find that this great Government is one of defined powers *by the express terms* of the Constitution, which creates the government. In like manner we now go to the judicial decisions. We find them in exact accord with the terms of the instrument itself.

This Court has so often and repeatedly from the beginning held that the Government of the United States is one of limited and delegated powers that citation to cases is unnecessary and even superfluous. In a word as said in *Marbury v. Madison*, as quoted elsewhere, the Constitution may create certain departments and stop; "or establish certain limits not to be transcended by those departments. The Government of the United States is of the latter description." This is the universal rule.

THIRD:

That no express power was given over the subject of Speech and Press by the Constitution to the United States; and that they have no control whatever over either. That all control over the subjects was reserved to the several States as local self government, with all other police powers, and the States can alone legislate on the subject. That any attempted legislation by Congress on the subject is foreign to the object, purposes and scope of the Federal Government.

FOURTH:

That the First Amendment, for greater security to prevent usurpation, expressly forbids all such legislation by the United States, and expressly puts this prohibition on an equal footing with religious liberty. That this view has always been held as the only true view from the beginning:

1: *By the Convention that framed the Constitution.*

2: *By the States that ratified the same.*

3: *By the uniform practice of the General Government, in all of its three departments, down to the present administration.*

That the one exception was the brief period of the detested Sedition law of 1797, which drove from power the party who passed it, and stamped with disgrace those who brought it about. (But this may be said in behalf of that law, by contrast with the Espionage Bill, that it made the jury the judge of the facts, and made the truth a complete defense. It was execrated, together with its authors, not because it did not modify the Common law rule, but that it was bold usurpation of power).

FIFTH:

That without this immunity from control, by the General Government there can be no perpetuity of the Constitution itself. For the Government being Federal in character only has in this partition of powers those relating to Inter-State and foreign matters. That is to say, that the Espionage Bill, while it professes to strike at those who are guilty of certain offenses by speech or press, the Espionage Act itself *strikes at the very vitals of the Constitution*, and takes control by the General Government the police power. Thus said Mr.

Jefferson of the election of 1800, by which the sedition law was overthrown: "It saved the Constitution in its last gasps."

SIXTH:

That therefore the Espionage Act, if construed to control speech and press, is *a palpable, violent, dangerous destruction* of the constitution and is therefore, void and of no effect; and as said before, this has always been so regarded in the United States as the correct view, *and upon this great cornerstone*, now rejected by the present Administration, the Democratic party (then called Republican) *came into existence*; and Jefferson, and every one of his successors, until Woodrow Wilson, was elected upon this distinct platform or principle.

SEVENTH:

That our separation from England; our Declaration of Independence; the Constitution and the Government which it creates, was brought into existence by and through the assertion of free speech and press, *and that it can only be maintained through the same power and influence*.

And in the maintenance of these great truths (for which I say modestly my ancestors made unusual sacrifices), I will here, in the time allotted, exert every faculty of mind to maintain, for the present and the future liberties of an ungrateful

country, and the preservation, in its true spirit, of the Constitution of these States. It has passed through many vicissitudes, *but it was never endangered as at present.* War against the European powers,—war commenced against the advice of Washington and Jefferson,—*does not call for war upon the rights of the American people.*

But it has been made, in striking down every Constitutional guarantee; vesting in the President every power whether delegated to Congress or reserved to the people. For the truth of this Indictment I confidently appeal to the Record, as that Record will go into history, and the greatest, it has silenced the voice of the people to discuss these infractions.

War, not less than peace is to be conducted according to its provisions. The Constitution is the sovereign will of the people, and that will is wiser and better than the judgment of any man, invested with temporary power. In any event it is the Supreme law.

THE WAR POWER—WHAT IS IT?

All over the land we hear men talking of the WAR POWER of the Government. They are excusable, for even Congress and the President seem to proceed upon the theory that we have one Constitution in peace and in War another Constitution, or in fact none. And it may truthfully be said that the promi-

ment measures proceed upon the idea that the powers of the United States in War are unlimited.

In addition to what has been stated elsewhere the correct view may here be repeated. The President occupies two relations.

First: He is the President and as such is the Chief Executive Officer, whose duty is "to see that the laws are faithfully executed." His duties are purely civil.

Second: As President he is the "Commander-in-Chief of the Army and Navy and of the militia when called into actual service." In this relation he is purely a military officer—he commands the Army and he has no other powers than any other military officer in the field.

It is a great mistake, as time has shown, to attempt to unite in the same person both civil and military duty. As much so as if the Chief Justice had been given command of the Army. But such is his relation and we must consider it as it exists.

What then may he do as Commander-In-Chief? We let that be answered by quoting from the clear statement of Ex-Justice Benjamin R. Curtis of the Supreme Court in 1863. Justice Curtis wrote a pamphlet at that time largely circulated and which had great influence. This we call to the attention of the court and ask that it be read in full and considered, found in the work of his brother "Constitutional History of the United States." (Appendix 674.) Referring to some of the events at that time he said:

“It no longer remains to be suggested, that if the ground of action announced by the President be tenable, *he may*, as Commander-In-Chief use powers not delegated to the United States by the Constitution; or *may* use powers by the Constitution exclusively delegated to the legislative and judicial departments. * * * The necessary result of this interpretation of the Constitution is, that, in time of War the President has any and all power, he may deem it necessary to exercise to subdue the enemy; and every private and personal right of individual security against mere executive control and every right reserved to the people rests merely on executive discretion.

But the military power of the President is derived solely from the Constitution and it is as clearly defined as is purely civil power.” (He quotes a clause making him Commander-In-Chief). “This is his military power. He is the General-In-Chief and as such in prosecuting the War may do what Generals in the field are allowed to do within the sphere of their activities *in subordination to the laws of their country from which alone they derive their authority*. Does it mean that he shall possess military power and command over the citizens of the United States; that by making edicts, he may control all citizens as if enlisted in the Army or Navy? * * * The President is Commander-In-Chief of the Army and Navy, not only by force of the Constitution, but under and subject to the Constitution and to every

restriction therein contained, and to every law enacted by its authority, as completely and clearly as a private in the ranks. * * * In the noise of arms have we become deaf to the warnings of our Fathers to take care that the military shall be subordinated to the civil powers. Some say it is a necessary act. They seem to have forgotten that every military act is to be tested by the Constitution and under the laws under whose authority it is to be done." (Pages 677-678).

"Are the great principles of free Government to be used and consumed as a means of War? Are we not wise enough and strong enough to carry on this War to a successful military end without submitting to the loss of one great principle of liberty. There is a military law; and there is martial law. Military law is that system of laws enacted by the legislative power *for the Government of the Army and Navy and militia when called into service. It has no control over any person or property of any citizen. The persons and property of private citizens of the United States are as absolutely exempt from the control of military law as they are exempt from the control of the laws of Great Britain*" (Page 679).

"Let us beware how we borrow weapons from the armory of arbitrary power. They cannot be wielded by the hands of a free people. Their blows will finally fall upon themselves." (Page 682). (The italics are the original.)

He cites with approval the great case of *Mitchell v. Harmony*, of the Supreme Court elsewhere cited.

Attention has already been called to the clear opinion of Chief Justice Taney in the Carpenter Case upon the above subject. We now call attention to the case of *Mitchell v. Harmony* (13 Howard 115). In this case Harmony obtained permission to follow the noted Doniphan Expedition with his wagons and trade with the inhabitants. At some point he proposed to stop. Acting under the orders of Colonel Doniphan, Colonel Mitchell ordered him not to stop but to continue with the command. His teams were used in some of the operations and they and his goods were finally lost. He afterwards sued Colonel Mitchell and the court held that the order of Mitchell refusing to allow him to stop was a trespass and a seizure of the goods. This was going a long ways. This court said:

“The movement upon Chilhaubau was undoubtedly undertaken from high and patriotic motives. It was boldly planned and gallantly executed, and contributed to the successful issue of the war. But our duty is to determine under what circumstances private property may be taken from the owner by a military officer in time of war (p. 134).”

“And the question here is, whether the law permits it to be taken to insure the success of any enterprise against the public enemy which the commanding officer deems it advisable to undertake.

And we think it very clear the law does not permit it." (pp. 134-5).

And the court decides that the government can take private property by force *in only two cases*. First, to prevent it from falling into the hands of the enemy and second, "for the purpose of converting it to the use of the public service, but the danger must be immediate and impending, *or the necessity urgent for the public service, such as will not admit of delay.*" And, as before stated, the court holds that it is clear *that to carry on a distant enterprise is not such an emergency as will allow the seizure.*

And after Civil War in *Dow v. Johnson*, 10 Otto 158, this question again came before the Supreme Court. The court was divided upon one question, as to whether the people of New Orleans, after the capture of the city, were belligerents or citizens.

But in both opinions *Mitchell v. Harmony* is quoted and it is said expressly by both opinions *announces the true law*. Justice Harlan in the majority opinion says: "We do not controvert the doctrine of *Mitchell v. Harmony*, 13 Howard; on the contrary we approve it." The minority opinion, by Justice Clifford, says: "In order to seize such property the public danger must be imminent and impending, and the emergency in the public service be extreme and imperative. * * * We support all of the principles before enunciated, found in the able opinion of the court given by Chief Justice Taney in *Mitchell v. Harmony*, 13 Howard 115."

I now proceed to unfold the above principles—sad indeed it is that the necessity exists! I reverse the order of the Statement above somewhat, by first showing *the necessity* of free speech in a Republic.

FREEDOM OF OPINION, SPEECH AND PRESS INDISPENSABLE IN REPUBLICS.

NECESSITY OF THIS FREEDOM TO EXISTENCE OF A REPUBLIC.

. You say 'I liberated a wretch who was suffering for a libel on Mr. Adams.' I do not know who was the particular wretch alluded to; but I discharged every one under punishment or prosecution under the Sedition law, BECAUSE I CONSIDERED, AND NOW CONSIDER THAT LAW TO BE A NULLITY, AS ABSOLUTE AND PALPABLE AS IF CONGRESS HAD ORDERED US TO FALL DOWN AND WORSHIP A GOLDEN IMAGE: AND IT WAS AS MUCH MY DUTY TO ARREST ITS EXECUTORS IN EVERY STAGE, AS IT WOULD HAVE BEEN TO RESCUE THEM FROM THE FIRE BY THOSE WHO SHOULD HAVE BEEN CAST INTO IT FOR REFUSING TO WORSHIP THE IMAGE. Jefferson to Mrs. John Adams, July 22, 1804, Vol. 4, p. 23.

“Nor does the opinion of the unconstitutionality, and consequent nullity of the law remove all restraint from the overshadowing torrent of slander, which is to confound vice

and virtue. The power to do this is fully possessed by the several State legislatures. It was reserved to them and denied to the General Government." To Same Sept. 11, 1804, Vol. 4, p. 27.

Opinion of two leading members of the Convention that framed the Constitution on the powers of Congress over Speech and Press and also joint authors of the Federalist.

"A Bill of Rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain exceptions to various powers not granted: and on this very account, would afford a pretext to claim more than was granted. For why should it be said things shall not be done which there is no power to do?

Why, for instance, should it be said, the liberty of the press shall not be restrained when no power is given by which restraints may be imposed. I will not contend that such a provision would confer a regulating power, but it is evident that it would furnish to men disposed to usurp, a plausible pretense for claiming the power. * * This may serve as a specimen of the numerous handles which would be given the doctrine of Constructive powers." Hamilton Federalist No. 84.

"The General Assembly doth particularly protest against the palpable and alarming infraction of the Constitution, in the two late cases of the Alien and Sedition Acts; * * * And the other of which acts exercises, in like manner, a power not delegated by the Constitution, but, on the contrary, expressly and positively forbidden by one of the amendments thereto—a power which more than any other, ought to produce universal alarm, because it is leveled against the right of freely examining public characters and measures, and a free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right." James Madison "Father of the Constitution." 4th Elliott Debates 528.

“For in certain countries, which profess to enjoy the privileges of freedom, every individual agent of the government may violate the laws with impunity, since those whom he oppresses cannot prosecute him before the courts of justice.

In this case the liberty of the press is not merely a guaranty, *but is the only guaranty of their liberty and their society which the citizen possesses.* But in those countries in which the doctrine of the sovereignty of the people ostensibly prevails, the censorship of the press *is not only dangerous but it is absurd.* * * * The sovereignty of the people and the liberty of the press, may therefore be looked upon as correlative institutions; just as censorship of the press and universal suffrage are two things which are irretrievably opposed *and which cannot long be maintained among the institutions of the same people.* * * * He (that is the controller of the press) would be the supreme master of the whole community, and he would be as free to rid himself of the authors as of their writings. In this question, therefore, there is no medium between servitude and freedom; *and in order to enjoy the inestimable benefits which liberty of the press insures, it is necessary to submit to the inevitable evils it engenders.* To expect to acquire the former and escape the latter, is to cherish one of those illusions which commonly mislead nations in the importance of consequences, when torn with factions and exhausted by effort *they expect to*

combine hostile and contrary opinions in the same soil." De Tocqueville, *Democracy in America* I, p. 195.

By scholars it is admitted that this is the greatest work ever written upon American Institutions, and was once the text book of all who aspired to any knowledge of our institutions. The same author says:

"THE AMERICAN REVOLUTION BROKE OUT AND THE DOCTRINE OF THE SOVEREIGNTY OF THE PEOPLE WHICH HAD BEEN NURTURED IN THE TOWNSHIPS TOOK POSSESSION OF THE STATE; EVERY CLASS WAS ENLISTED IN ITS CAUSE; BATTLES WERE FOUGHT AND VICTORIES OBTAINED FOR IT, UNTIL IT BECAME THE LAW OF LAWS," Vol. 1, p. 56.

Without discussing it here, let it be said that the Revolution drove the sovereignty of rulers from this continent, and enthroned the sovereignty of the people, and it also *enthroned the doctrine, as a corollary, the right of the sovereigns to criticize their agents, so indispensable to the maintenance of the new theory.* But the causes which have filled enlightened thinkers with admiration for liberty, and for the freedom of the press, through which it can only be gained, has ever provoked the intolerance and oppression of rulers. It was well said by Erskine:

"Other liberties are held under governments, but the liberty of opinion, keeps governments themselves in due subjection to their duties; this has

produced the martyrdom of truth in every age; and the world has been only purged from ignorance, with the innocent blood of those who have enlightened it." (Erskine's speech for Paine.)

I deplore the lack of eloquence possessed by this great advocate and patriot, but I trust that my courage may be equal to his, which ever stood against the enticements of the crown, and the arbitrary powers of Tory courts to subdue him. To him England and America owe more than to any other advocate for establishing this great right.

"The sun might as easily be spared from the universe as free speech from the liberal institutions of society." (Soerates.)

"No greater calamity could come upon a people than the privation of free speech." (Demosthenes.)

"This is true liberty, when free-born men, having to advise the people, may speak free."—Euripides.

"For this is not the liberty that we can hope for that no evil shall arise in the commonwealth,—this, let no man in the world expect, but when complaints *are freely heard, deeply considered and speedily reformed*, then is the utmost bound attained that wise men can look for." Milton's *Arcopagitica*, p. 50, Works Vol. IV.

"Good and evil, we know, in the field of this world grew up together almost inseparable; and the knowledge of good is so involved and inter-

woven with the knowledge of evil, and in so many cunning resemblances hardly to be discovered. * * *

It was from the rind of the apple tasted that the knowledge of good and evil leaped forth into the world. And this perhaps is that which Adam fell into of knowing good and evil, that is to say, of knowing good by evil." (Same; pp. 67-68.)

"When God gave him reason he gave him power to choose, for reason is but choosing." (p. 76).

And did He not also with reason give him speech? Did He not also create him as to need Government and to this free discussion is necessary or compel all men to live under despotism?

Said the great orator, statesman, patriot Sheridan: "Give me but the liberty of the press, and I will give the minister a venal House of Peers,—I will give him a corrupt and servile House of Commons,—I will give him the full swing of the patronage of office,—I will give him the whole host of ministerial influence,—I will give him all the power that place can confer upon him to purchase submission, and overawe resistance; and yet, armed with the liberty of the press, I will go forth to meet him undismayed; I will attack the mighty fabric he has reared, with that mightier engine; I will shake down from its height corruption, and lay it beneath the ruins of the abuses it was meant to shelter." Constitutional History of England, May's Vol. 2, p. 181.

Let us pause here a moment and reflect. Our

Constitution, in all of its provisions, is based upon the idea that men are fallable; that they will go astray; that Presidents, Congresses, and Courts need to be restrained; to prevent this it has divided power among the States and General Government. It has divided the latter into three great independent departments. It has required oaths to support the Constitution—not the flag, which is but an outward emblem of the Constitution, and evidences its presence; not the Government, which is but an organ to carry out the Constitution; it has prescribed short terms; it marks out powers and limits them; it provides impeachments and frequent elections, *but take away the right of the sovereign people to criticise their servants and agents*, and throw around rulers the protection of infallibility, which is the rule in monarchies, *and what is left of our boasted Constitution and liberties?* How long will it be before we have a corrupt Congress? How long will it be before “the full swing of the patronage of office” will become corrupt? *Where else can security be found and how can free government be maintained except by free speech and press?*

In those Governments, founded on the sovereignty of rulers free speech, in mere subjects, may be denied. But where can place be found for this denial, where the people themselves are sovereign and citizens?

If reason prevailed you would see how absurd

it is that it shall be a crime against rulers, for their masters to criticise their agents. If sovereignty is in the people and they but "delegated powers" to the government, it is a reversal of all reason that "the servant is above his master;" and that is exactly what Espionage Bills attempt to do; and for that reason they are in conflict with the fundamental idea of American governments, and without Constitutional authority.

Said Mr. Jefferson: "Let us hear no more of trust in men, but let us bind down by the iron chains of the Constitution, those whom we are forced to entrust with **power.**"

Said one of the greatest intellects of the Revolution (whose name has perished—Malcanthton Smith) in the New York Convention: "I do not say that all men are dishonest, but when you come to frame a Constitution, if you proceed upon that theory you will make no mistake." *Our Constitutions are framed upon that very theory*, but what does this avail if public criticism is a "felony?"

On the *indispensible necessity* of free Speech and free Press, I now quote from the greatest Constitutional writer of the English speaking people.

Says Macauley in his review of Hallam: "We would like Mr. Hallam better, if he had praised one party and abused the other. Eulogy and invective may be had for the asking; but for the one weight and the one measure we know not where else to go."

"No confidence in the general integrity of a government, much less in that of its lawyers, least of all any belief in the guilt of an accused person, should beguile us to remit that vigilance which is peculiarly required in such circumstances.

For this vigilance, and indeed for almost all that keeps up in us, permanently and effectually, the spirit of regard to liberty and the public good, we must look to the unshackled and independent energies of the press." Hallam's Constitutional History of England, Vol. 2, p. 375.

On the value of free speech I quote another authority,—it is no less than the author, as a private citizen then, who now as President, who asked for and signed the Espionage Bill:

"We are so accustomed to agitation, to absolute, free, outspoken argument for change to an unrestricted criticism of men and measures carried almost to the point of license, to us it seems a normal harmless part of the familiar processes of popular government. We have learned that *it is pent up feelings that are dangerous, whispered purposes that are revolutionary*, covert follies that warp and poison the mind; that the wisest thing to do with a fool is to encourage him to hire a hall and discourse to his fellow citizens. Nothing chills nonsense like exposure to the air; nothing dispels folly like its publication; nothing so eases the machine as the safety valve. *Agitation is certainly of the essence of a constitutional system, but those*

who exercise authority under a non-constitutional system fear its impact with a constant dread and try by every possible means to check and kill it, partly no doubt because they know that agitation is dangerous to arrangements which are unreasonable, and non-constitutional rule is highly unreasonable in countries whose people can express such common thoughts and contrive such concert of action as make agitation formidable. But there is always another reason why rulers so circumstanced should instinctively fear agitation. Agitation is unquestionably very dangerous in countries where there are no institutions—no parliaments, councils, occasional assemblies even—in which opinions may legitimately, and with the sanction of law transmute itself into action. Speech is not the only vent opinion needs; it needs also the satisfaction of action.” Constitutional Government in U. S. by Prof. Woodrow Wilson, pp. 38-9.

(Italics here and elsewhere in this brief added except as noted.)

And in another work, Prof. Wilson heads a chapter with a quotation thus:

“No more vital truth was ever uttered than that freedom and free institutions cannot long be maintained by any people who do not understand the nature of their own government.” Congressional Government by Wilson, p. 58.

The truth of the above is self evident; and no people can maintain free governments, that do not

both understand and appreciate its blessings. *How can they understand* the operation of their government, when Espionage bills make all adverse criticism a "felony?" How can free institutions be maintained when the arm and intellect of the people is palsied by silence and become inert, through the lack of use, and when nothing is free speech, but that which lauds rulers. This last free speech was allowed in the Turkish Empire; under the tyrant who destroyed the liberties of Athens; under Augustus who destroyed the liberties of Rome, and even under Robespierre, Napoleon and Cromwell. AND THIS LAST RULE OF FREE SPEECH IS NOW SOUGHT TO BE FASTENED UPON THE AMERICAN PEOPLE.

THE SEDITION LAW OF 1798.

As to the necessity of free speech and press to the establishment and maintenance of free institutions, I now turn to the greatest state paper—*greatest in its argument and greatest in its effect upon the permanent institutions of the United States*,—that was ever penned by an American. I refer to Mr. Madison's great Report upon the Alien and Sedition laws, which drove from power the Federalist party, destroyed it, and as was supposed forever banished Espionage laws here, brought into existence the Democratic party and placed in power the administration of Jefferson, and form-

ally established the doctrine as followed by the Supreme Court, that the Government of the United States was one of limited power *and had no Common Law jurisdiction or powers whatever.*

THE "FATHER OF THE CONSTITUTION" ON THE NECESSITY OF FREE SPEECH AND PRESS—MADISON'S
REPORT ON THE SEDITION LAW.

This great paper in speaking of the advantages of a free press, declares:

"Some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press. It has accordingly been decided, by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigor of those yielding the proper fruits. *And can the wisdom of this policy be doubted* by any one who reflects that to the press alone, checked as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression; who reflects that to the same beneficent source the United States owe much of the lights which conducted them to the rank of a free and independent nation, and which have improved their political system into a shape so auspicious to their happiness? Had Sedition Acts, forbidding every publication that might bring the constituted agents into contempt or disrepute, or that might excite the hatred of the people against the authors of un-

just or pernicious measures, been uniformly enforced against the press, might not the United States have been languishing, at this day, under the infirmities of a sickly Confederation? Might they not, possibly, be miserable colonies, groaning under a foreign yoke?" Madison's Report, Elliott's Debates on the Federal Constitution, Vol. IV, p. 571.

But need the great benefits of free speech and free press be urged in an American Court? Espionage bills which destroy free speech and free press—thought to be necessary in the prosecution of our first European war—and which bills destroy all free government, makes the painful necessity.

The great Franklin, almost on the brink of the grave, as did Washington, has left his invaluable testimony, now sought to be rejected.

CONSTITUTIONALITY OF THE ESPIONAGE ACT.

I now come to the discussion of the Constitutionality of such laws, under the heads hereafter stated.

It is fortunate, indeed, when a great legal question does not rest alone on words or thin interpretation, but can be settled by *Historical Facts* about which there can arise no doubt. Such is the case in this instance. *History pulverizes every atom of the Act and confounds its authors and abettors.*

HISTORICAL FACT ONE.

THE CONVENTION ON PRESS AND SPEECH.

In the Convention that framed the Constitution, near the close, and after the report of the committee on form, the following occurred:

"Wednesday, Sept. 12.

In Convention; Dr. Johnson from the Committee of Style, reported a digest of plan of which printed copies were ordered furnished to the members." I Elliott 535.

"Friday, Sept. 14.

Mr. Pinckney and Mr. Gerry moved to insert a declaration: 'That the liberty of the press be inviolably observed.' Mr. Sherman: It is unnecessary. *The power of Congress does not extend to the press.*

On this question it passed in the negative.'" 5 Elliott, 545.

Here we have the declaration by the Convention that Congress had no power over the press.

Washington and the convention heard the solemn statement of the old patriot Roger Sherman, that "the power of Congress does not extend to the press." And the men who framed that Constitution acquiesced in this view.

Did the Convention itself know what it did and intended? Congress and the President one hundred and thirty years after the event say not and that too after the political organization they pro-

fess to belong had been brought into existence on the same principle, *that no such power was given.*

It simply comes to this in determining the legality of this Espionage Bill: what is to be accepted? *The Convention that framed the Constitution, or Mr. Wilson and the present Congress?*

If courts can overcome this evidence, then it but illustrates the truth of Marshall's words, quoted elsewhere that Constitutions are useless contrivances to control power, if acts repugnant to it are valid.

Now, here by the official proceedings of the convention that framed the Constitution, is the positive testimony of that Convention that the Constitution, which they had framed, and which was to be submitted to the States for their action, *contained absolutely no power whatever to pass any law whatever, affecting either speech or press.* The Convention said plainly the Espionage act is void and without lawful authority.

If such testimony as this is to be whittled away, *what is the use of written Constitutions?* If the testimony of George Washington, and his associates, who framed this magnificent form of government, that they gave no such power is to be destroyed on the demands of the present day in and of our first European war, the effort to found free governments by definite and certain written Constitutions, is a failure. *That is all there is to the subject and to this case.* Power may set the law

aside but the wounded, through outraged law and record, remains to confront the authors of this measure. Another Jefferson will in time arise to right the wrong, and another Congress will refund the fines, as former Congresses did to the victims of the Sedition law. There will be a reckoning, but it will not be by anarchy, but by law. The last election foreshadows the future. The Blood of the martyrs has ever been the seed of the church.

In all of the Conventions that were called to act upon the Constitution, to the objections, that there was no Bill of Rights, and no express provision securing the freedom of the press, it was replied, that the Congress had been given no power over the subject. (See Madison's statement hereafter quoted.)

It was *expressly upon this representation* and distinct understanding that the Constitution was ratified by the States. The proceedings in but one convention will be cited.

In South Carolina General Lincoln wanted to know why this omission existed. He said:

"The liberty of the press was the tyrant's scourge—it was the true friend and supremest supporter of civil liberty; therefore why pass it by in silence?" 4 Elliott's Debates, p. 314.

He was immediately answered by General Pinckney, *the very man who in the Federal Convention moved such a clause*, but whose motion was rejected, because the Convention said it was un-

necessary as *Congress would have no power over the press*. General Pinckney said:

“With regard to the liberty of the press, the discussion of that matter *was not forgotten* by the members of the Convention. *It was fully debated*, and the impropriety of saying anything about it in the Constitution clearly evinced. The General Government has no powers, *but what are expressly granted to it*; it therefore has *no power to take away the liberty of the press*. That invaluable blessing, which deserves all the encomiums the gentleman has justly bestowed upon it, is secured by all our State constitutions; *and to have mentioned it in our general Constitution would perhaps furnish an argument, hereafter, that the General Government had a right to exercise powers not expressly delegated to it.*” Elliott’s Debates, Vol. 4, p. 315.

I have given the proceedings in the Federal convention, and now the positive statements above that this very subject was fully discussed in the Convention, and unanimously determined by the men who framed the Constitution that Congress had no power.

If in the light of this record Congress and Courts will sustain Espionage bills, not only regulating the press, *but destroying it*, then indeed has our magnificent Constitution perished.

HISTORICAL FACT TWO.

THE STATE CONVENTIONS RATIFY THE CONSTITUTION WITH UNDERSTANDING IT GAVE NO POWER OVER PRESS AND SPEECH.

In all of the State Conventions called to pass upon the Constitution, or in many of them, the opponents urged the want of any security for Speech and Press as an objection. It was uniformly replied that this was unnecessary as no power over these subjects was given to the General Government. (See Mr. Madison's statement hereafter.)

Space will not permit a reference to all the State Conventions. In the Virginia Convention, it was universally replied that no power whatever was given to the United States over Speech and Press. In the resolution ratifying the Constitution, it was declared:

"That, therefore, no right of any denomination can be cancelled, abridged, restrained or modified, by Congress, by the Senate and House of Representatives, acting in any capacity, by the President, or any department or officer of the United States, except in those instances in which power is given by the Constitution for that purpose; *and that, among other essential rights the liberty of conscience and of the press cannot be cancelled, abridged, restrained, or modified, by any authority of the United States.*" Elliott's Debates, Vol. 3, p. 656.

And to those who worship Chief Justice Marshall, let it be said, he was a member of the committee that wrote and reported this Resolution, and hence Marshall has given an opinion more solemn than if by the Court, that Espionage Bills are void. For he states that not only as the law, but he put into the solemn act of ratification that Virginia adopted the Constitution with express understanding.

And what was that *understanding*? That no power was given, by the Constitution they had just ratified, to the United States the liberty of the press "cannot be *cancelled, abridged, restrained or modified.*" Has it been? Answer: The Defendant has been convicted and sentenced to ten years imprisonment, for two words—"cease firing." Yet the Constitution makes it lawful to "cease firing" and substitute a treaty of peace! And then months after this all men rejoice because we did "cease firing."

And it is a matter of historical record, that in every Convention ratifying the Constitution, it was universally understood, and in many so declared, that the understanding was that they were surrendering no power to the United States over Speech and Press. And it is absolutely certain that not a single state would have ratified the Constitution, could it have been believed that the power intended to be exercised by the Espionage Bill, had been given.

This is history as well established—or better that Christ died on the Cross and Washington Commanded in the Revolution. It requires all the grace and forbearance that comes from God to restrain feelings of hatred and anger against those who would now ignore and set aside this record and hand over the people to the slavery they escaped by this Record.

HISTORICAL FACT THREE.

THE FEDERALIST WRITTEN TO SECURE RATIFICATION DECLARE NO POWER GIVEN OVER PRESS AND SPEECH.

The Federalist was addressed to the people during the pendency of the Constitution, and was written by two prominent members of the Convention—Madison and Hamilton. It was regarded then, as it is now with students, as the greatest work ever written upon our Constitution. Mr. Jefferson says it was the greatest work ever written upon Government and he regretted that it did not cover the subject generally; and in *Cohen v. Virginia*, Chief Justice Marshall is equally eulogistic. It is admitted to have exercised a great influence in securing the ratification of the Constitution. It has always been the *highest* authority on its true meaning.

In this work, addressed to the people then asked to adopt the Constitution, Hamilton said:

"No power over Press was given." See his remarks at the head on this subject, page 65, this Brief, and he protested against the Sedition Bill as both unwise and illegal. He called it "tyranny."

HISTORICAL FACT FOUR.

AMENDMENT TO PROHIBIT THE POWER OVER PRESS TO REMOVE FEAR OF USURPATION.

So highly did the people at that day esteem the Press and Speech, and so hostile were they to transferring this control to the General Government, as before stated, they demanded an Amendment, in the nature of a Bill of Rights, absolutely prohibiting the exercise of any such power. This is the clear history of the matter. So the First Amendment was proposed and ratified *by every State*.

Those who advocated the Sedition laws, as those who now advocate and enforce the Espionage Act, say this only prevents the abridgement of the freedom of the Press, but not its control. When we regard the history of the matter and pay attention to the provisions of the Constitution it but shows that it is impossible by any known words to confine those in office within prescribed bounds, and as said by the Federalist (No. 84) speaking of this very point "I will not contend that such a provision would confer a *regulating power*, but it is evident that it would furnish to men *disposed to usurp, a plausible*

pretense for claiming the power." And so it did it 1798-9, and so in 1917-8. But here Hamilton calls them "*usurpers.*" This shallow claim is exposed elsewhere but briefly it may be pertinently stated at this point.

First. The view here taken of the meaning of the First Amendment is precisely that of Congress in submitting it and the States in ratifying. This intention, when ascertained is binding, even if the words could be given a different meaning. This rule of construction is universal. This will be shown.

Second. Nothing is more certain from history than it would never have been adopted, but in this sense, and never in the sense now sought to be given to justify the Espionage Act.

Third. The statement of Madison—the other Author of the Federalist—hereafter quoted on this matter, was never excelled for logic. It equals the statement of Marshall in *Marberry v. Madison*, as to the supremacy of the Constitution and the invalidity of any act of Congress in conflict with it. Says Madison:

"Nay, more; the construction employed to justify the Sedition Act would exhibit a phenomenon without a parallel in the political world. It would exhibit a number of respectable States, as denying, first, that any power over the press was delegated by the Constitution; as proposing, next, that no such power was delegated; and, finally, as concurr-

ing in an amendment actually recognizing or delegating such a power." (4 Elliott 172.)

It is doubtful if in the whole range of our language there can be found another passage of equal length so unanswerable in logic, and based upon unquestioned historical facts. It will bear repeating, for the purposes of emphasis.

It first asserts, that the construction of the original Constitution and the first Amendment insisted upon to justify the Sedition Act and now to revive the Espionage Bill "would exhibit a phenomenon without a parallel in the political world." *He then proceeds to demonstrate this by historical facts.* That a number of respectable States, first *denied that any power over the press was delegated by the Constitution.* This fact is as plain in our history as that the Constitution was framed and submitted to the States. Next, as proposing an Amendment to the effect, and for greater security, "*that no such power was delegated.*" If we will turn to the history of that matter and the demands of the States; and also to the language of Congress in submitting the Amendment, this is also clearly established. And next, in ratifying an Amendment "*actually recognizing or delegating such a power.*" That is to say, as to the last, it was then claimed, and is now claimed, that the first Amendment *actually recognized*, the existence of a power in Congress over Press and Speech, and then simply provided that *the liberty of Speech and Press should*

not be impaired. This last, being not only in conflict with the historical fact, *but utterly repugnant to the contentions then put forth as to the true meaning of the Constitution.* Yet, in attempting to sustain the validity of the Sedition Law, and now of the Espionage Bill, those who advocate these measures, truly, as said by Mr. Madison, "exhibit a phenomenon without a parallel in the political world." It is such a result *that demonstrates, beyond all controversy that the interpretation, then and now put forth, is without even the semblance of substance.*

HISTORICAL FACT FIVE.

NO PROVISION FOR THE TRUTH BEING SHOWN, OR THE JURY SHALL BE THE JUDGES OF BOTH THE FACT AND LAW.

It is claimed these laws are Constitutional. Their supporters are not now agreed in where the power is found in the Constitution. This throws great doubt on its existence. From earliest dawn of English history, a contest had gone on there, to secure the freedom of Speech and Press. (See for a full and perhaps most accurate account Mays Constitutional History of England, Vol. 2, Chapter IX-X). In 1787 when the Constitution was framed, it was then the foremost question. The Fox Act, allowing the truth to be given in evidence, and making the jury the sole judge of both fact and law

excluded, in parliament and with the people, almost every other question. It became a law in 1792. In Virginia and all the States that had adopted Constitutions, the provisions of the Fox Aet had been incorporated into their Bill of Rights. It is perhaps at this day found in all State Constitutions. George Mason a few years before had placed it as one of the great rights, in that of Virginia. The record shows that he and Roger Sherman especially, were ever on the watch to secure every right of the citizen, in the Convention that framed the Constitution. Our debt to both is great. Yet we are asked, by those who assert the validity of this Espionage Act, that power to pass it was given, *and no patriot of that day proposed this inestimable security*, for which the whigs had long contended in England, and were then contending. Yet the Convention professed their object to be, to found a freer Government than that of England. In fact the colonies had seceded and declared their independence for that purpose.

The assertion is a slander on the men composing that Convention and by men who possibly carry no Revolutionary blood as they assuredly hold to no Revolutionary principles.

Did then the patriots of that Convention frame a Constitution creating a system, deemed despotic in England? The question answers itself and answers conclusively the contention as to the Constitutionality of the Espionage Act.

There is but one solution of this matter. That is they gave no power over the subject, or right to legislate on it. And so the Convention expressly resolved.

And in this very case, if a true Bill of Exceptions had not been refused, it would appear the court refused an instruction, that the jury were the judges of the law; and refused to allow the truth in evidence. Thus in these cases, in United States Courts, rights are denied here, enjoyed in England since 1792.

And yet they tell us that "licentiousness" of press alone, is prohibited, while they try men, and refuse to allow them to prove the truth about Governmental matters. So as administered to truly tell what the Government does is licentiousness. And they are logical in this; such has ever been the operation and object of Espionage Bills—the people must not be allowed to tell the truth about Government affairs.

HISTORICAL FACT SIX.

JEFFERSON, MADISON AND ALL OTHERS ELECTED ON THE PRINCIPLE OF NO POWER WHATEVER IN CONGRESS OVER THE SUBJECT.

The Federalist Party (without the aid of Hamilton) passed the Alien and Sedition laws. This immediately caused widespread alarm and opposition

showing the spirit of the people then prevailing. These acts, and especially the last, brought into existence the Democratic Party, then called the Republican. Virginia passed Resolutions condemnatory of these measures, written by Mr. Madison, and the Kentucky Resolutions were written by Mr. Jefferson. The Virginia Resolutions in part were as follows:

“That the General Assembly doth particularly PROTEST against the palpable and alarming infraction of the Constitution, in the two late cases of the ‘Alien and Sedition Acts,’ passed at the last session of Congress; the first of which exercises power nowhere delegated to the Federal Government, and which, by uniting legislative and judicial powers to those of executive, subverts the general principles of free Government as well as the particular organization and positive provisions of the Federal Constitution; and the other of which acts exercises, *in like manner, a power not delegated by the Constitution, but, on the contrary, expressly and positively forbidden* by one of the Amendments thereof—a power which more than any other, ought to produce universal alarm, because it is levelled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right.” 4th Elliott’s Debates, p. 528.

JEFFERSON ON ESPIONAGE BILLS.

The Kentucky Resolutions written by Mr. Jefferson in part were:

3: "RESOLVED. THAT IT IS TRUE, AS A GENERAL PRINCIPLE, AND IS ALSO EXPRESSLY DECLARED BY ONE OF THE AMENDMENTS TO THE CONSTITUTION, THAT 'THE POWERS NOT DELEGATED TO THE UNITED STATES BY THE CONSTITUTION, NOR PROHIBITED BY IT TO THE STATES, ARE RESERVED TO THE STATES RESPECTIVELY OR TO THE PEOPLE'; AND THAT, NO POWER OVER THE FREEDOM OF RELIGION, FREEDOM OF SPEECH, OR FREEDOM OF THE PRESS, BEING DELEGATED TO THE UNITED STATES BY THE CONSTITUTION, NOR PROHIBITED BY IT TO THE STATES, ALL LAWFUL POWERS RESPECTING THE SAME DID OF RIGHT REMAIN, AND WERE RESERVED TO THE STATES OR TO THE PEOPLE; THAT THUS WAS MANIFESTED THEIR DETERMINATION TO RETAIN TO THEMSELVES THE RIGHT OF JUDGING, HOW FAR THE LICENTIOUSNESS OF SPEECH AND PRESS, MAY BE ABRIDGED WITHOUT LESSENING THEIR USUAL FREEDOM, AND HOW FAR THESE ABUSES WHICH CANNOT BE SEPARATED FROM THEIR USE, SHOULD BE TOLERATED RATHER THAN THE USE BE DESTROYED; AND THUS ALSO THEY GUARDED AGAINST ALL ABRIDGEMENT BY THE UNITED STATES, OF THE FREEDOM OF RELIGIOUS PRINCIPLES AND EXERCISES, AND RETAINED TO THEMSELVES THE RIGHT OF PROTECTING THE SAME." 4th Elliott, 540.

The Federal party was in power. It also had control of nearly all the States and out of 120 papers

controlled one hundred. Today the daily papers have grown through liberty of the press. Nearly all however have been bought—the fact is notorious—to aid in striking down this right in the people.

Upon these declarations of Madison and Jefferson, *that there was absolutely no power* in the United States over Speech and Press, the people triumphantly elected both to the Presidency. The people who did this and thus pronounced this judgment, which has always been respected until now, and considered final, were practically *the very same people who a few years before had adopted the Constitution.*

The Virginia Resolutions were sent to the different States. Five Federal States made reply—all being vindictive and insulting, except Massachusetts, which undertook to defend the Constitutionality of these acts.

After the replies, the Virginia legislature adopted the great report written by Madison. It said, among other things:

“The *second* object, against which the resolution protests, is the Sedition Act.

Of this act it is affirmed—1: That it exercises, in like manner, a power not delegated by the Constitution; 2: That the power, on the contrary, is expressly and positively forbidden by one of the amendments to the Constitution; 3: That this is a power which, more than any other, ought to produce universal alarm, because it is levelled against that right of freely

examining public characters and measures, and of free communication thereon, which has ever been justly deemed the only effectual guardian of every other right.

1. *That it exercises a power not delegated by the Constitution.*

Here again, it will be proper to recollect that, the Federal Government being composed of powers specifically granted, with reservation of all others to the States or to the people, *the positive authority under which the Sedition Act could be passed must be produced by those who assert its constitutionality.* In what part of the Constitution, then, is this authority to be found?

Several attempts have been made to answer this question, which will be examined in their order. The committee will begin with one which has filled them with equal astonishment and apprehension; and which, they cannot but persuade themselves, must have the same effect on all who will consider it with coolness and impartiality, and with a reverence for our Constitution, in the true character in which it issued from the sovereign authority of the people. The committee refers to the doctrine lately advanced, as a sanction of the Sedition Act, 'that the common or unwritten law'—a law of vast extent and complexity, and embracing almost every possible subject of legislation, both civil and criminal—makes a part of the law of these States, in their united and national capacity.

The novelty, and, in the judgment of the committee, the extravagance of this pretension, would have consigned it to the silence in which

they have passed by other arguments which an extraordinary zeal for the act has drawn into the discussion; but the auspices under which this innovation presents itself have constrained the committee to bestow on it an attention which other considerations might have forbidden."

On these explicit declarations Jefferson went before the country and was triumphantly elected,—*a judgment by practically the same people who had adopted the Constitution*, that Congress had no power whatever over either speech or press.

HISTORICAL FACT SEVEN.

ESPIONAGE BILLS, AND ALL LEGISLATION BY CONGRESS ALWAYS REGARDED AS ILLEGAL.

Since that verdict by the American people, for 117 years it has been regarded as a final judgment by the people of the United States, and by the Legislative and Executive Departments of the Government as a final settlement of both the expediency and the legality of all such laws.

In the Senate, in 1830, Mr. Buchanan, though slandered, perhaps the greatest lawyer ever president, said:

"It (the Sedition Act of 1797) was more equitable than the common law, because in all cases it made an indictment necessary, and it permitted the truth to be given in evidence. The popular odium

which attended this law was not excited by its particular provisions, *but by the fact that any law upon the subject was a violation of the Constitution. Congress had no power to pass any law of the kind, good or bad. It is now, I believe, freely admitted by every person, (I at least have not for several years conversed with any man who held a contrary opinion) that Congress, in passing this Act, had transcended their powers.*" Trial of Judge Peck, p. 447.

As to the weight of this long acceptance I quote the words of the Father of the Constitution (Mr. Madison), towards the close of life, on another matter:

"And may it not be fairly left to the unbiased judgment of all men of experience and of intelligence, to decide, which is most to be relied on for a sound and safe test of the meaning of a constitution,—a uniform interpretation by all and successive authorities under it, commencing with its birth, and continued for a long period, through the varied state of political contests; or the opinion of every new legislature, heated as it may be by the strife of parties—or warped, as often happens, by the eager pursuit of some favorite object—or carried away, possibly, by the powerful eloquence or captivating addresses of a few popular statesmen, themselves, perhaps, influenced by the same misleading causes? If the latter test is to prevail, every new legislative opinion might make a new constitution, as the foot of every new chancellor would make a new standard of measure."

The Supreme Court of the United States has since, in numerous cases, announced the same sentiments, as to the persuasive effect of long acquaintance in a certain construction of the Constitution.

HISTORICAL FACT EIGHT.

ALL PERSONS CONVICTED AND IMPRISONED UNDER THE SEDITION LAWS WERE TURNED OUT BY JEFFERSON.

Mr. Jefferson being elected as President, immediately turned out of prison all those who had been convicted under the Sedition Act and discontinued all prosecutions of others.

He declared that the Act and all such prosecutions were unconstitutional, illegal and void, and were of no more validity than if the Act had required the people to fall down and worship a golden image.

See his statement at head of the subject, page 65, this Brief.

HISTORICAL FACT NINE.

CONGRESS, IN STRONG RESOLUTIONS, DECLARED SEDITION LAWS AND ALL CONTROL OVER THE PRESS UNCONSTITUTIONAL.

At a later date Congress, by resolution, declared the Sedition Act, and all power attempted to be exercised over speech and press was illegal, and re-

funded to those who had been convicted the amount of their fines that they had paid, costs and interest.

Matthew Lyon, of Vermont, was convicted in 1798. At the jail door he turned and announced himself a candidate and was elected to Congress, turned out of prison by Mr. Jefferson and served the balance of his term. He then went to Kentucky and was elected to Congress from that State. Died August, 1822. In 1840 Congress refunded the fine which had been imposed upon him, with interest, to his relatives, at the same time condemning the law under which he had been convicted.

PROCEEDINGS IN CONGRESS REFUNDING FINES.

The Congressional Record on only one of these cases can be printed. All might profitably be set forth.

See Congressional Globe, Volume 8, Session 1839-40, pg. 410 and subsequent. (*Italics are here added*).

"The following report was made on the subject of the claim by Mr. Turney of the Committee on the Judiciary. The Committee adopted the report made by the same Committee in 1832, which was read to the House, as will be found below.

"The Committee on the Judiciary, to whom was referred the petition of Crittenden Lyon and Matthew Lyon, heirs and representatives of the late Matthew Lyon, deceased, report:

“ ‘That in the month of October, 1798, the late Matthew Lyon, the father of the petitioners, at the Circuit Court, held at Rutland, in the State of Vermont, was indicted and found guilty of having printed and published what was alleged to be a libel against Mr. John Adams, the then President of the United States. The alleged libel was in the following words, to-wit:’ (The article is here omitted).

“The Court deemed both the publications above recited libelous, under the Second Section of the Act commonly called the Sedition Law, passed the Fourth of July, 1798; which Section is as follows, viz: ‘And be it further enacted: That if any person shall write, print, utter, or publish, or shall cause or procure to be written, printed, uttered or published, or shall knowingly and wilfully assist or aid in writing, printing, uttering, or publishing, any false, scandalous and malicious writing or writings against the Government of the United States, or either House of Congress of the United States, or the President of the United States, with an intent to defame the said Government, or either House of said Congress, or the President, or to bring them or either of them into contempt or disrespect, or to excite against them, or either or any of them, the hatred of the good people of the United States, etc., then such person, being thereof convicted before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding two thousand dollars, or imprisonment not to exceed two years.’ ”

“Upon this indictment, Matthey Lyon was

convicted and sentenced by the Court to be imprisoned for four months; and to pay a fine of one thousand dollars and the costs of the prosecution, taxed at sixty dollars, and ninety-six cents, and stand committed until the fine and costs were paid; which were paid, as appears by the exemplification of the record of the said trial and proceedings, now in the archives of this House.

“The Committee are of the opinion that the law above recited was unconstitutional, null and void, and passed under a mistaken exercise of undelegated power, and that the mistake ought to be corrected by returning the fines so obtained, with interest thereon, to the legal representatives of Matthew Lyon.

“The Committee do not deem it necessary to discuss at length the character of that law, or to assign all the reasons, however demonstrative, *that have induced the conviction of its unconstitutionality.* No question connected with the liberty of the press ever excited a more universal and intense interest—ever received so acute, able, long continued, and elaborate investigation—*was ever more generally understood, or so conclusively settled by the concurring opinion of all parties, after the heated political contest of the day had passed away.* All that now remains to be done by the Representatives of the people *who condemned this act of their agents as unauthorized and transcending their grant of power,* to place beyond question, doubt, or cavil that mandate of the Constitution prohibiting Congress from abridging the liberty of the press, and to discharge an

honest, just, moral and honorable obligation, is to refund from the Treasury, the fine thus illegally and wrongfully obtained from one of their citizens; for which purposes the Committee herewith report a Bill."

Bill passed the House, yeas, 124, nays, 15 (pg. 414, same record).

None of the Fifteen, except one, denied that the law was unconstitutional, but voted no, as they explained, because not satisfied that the fine had been paid, or, if paid, it was by public subscription. One Representative, who must have been very old, said he voted for the original Bill, and was still of the same opinion.

The Bill passed the Senate unanimously. So here is the unanimous verdict of the Houses of Congress. We here quote extracts from some of the speeches:

Mr. Turney, Chairman of the Judiciary Committee, said:

"The only ground of opposition had been that the money had been raised by friends, and that if it were paid, it would go into the hands of those who had paid nothing. Now, the question was not whether the money had been paid by Lyons or his friends; the question was whether the Government could conscientiously retain money paid under such circumstances."
General Waddy Thompson said:

"How stands this matter? Why a man who ranked among the patriots of his country,

who was cast into prison under an odious law—*one who deserved a monument, and had it in the heart of every true man, and stood up, one in ten thousand, against power and corruption, yet this man was entitled to no thanks from those who came after him. Here was a man, like the illustrious patriot of England, John Hampden, had stood up against power in high places, for which he had suffered ignominy, and been thrust into the cell of a felon, and yet, in these times, objection was made to remunerating his heirs, because the man had been too poor to pay the fine himself. That country must be base, indeed, which would sanction such a plea.*

That country no longer deserves to be free, which would deny justice to suffering patriots on such grounds.

He concluded by hoping that no further opposition would be made to the bill, *as there could be no one but who believed, that the law under which the fine was imposed was a violation of the Constitution.*" (Vol. 8, pg. 413).

Mr. Weller said:

"The gentleman from South Carolina had said enough to satisfy anyone that the Bill ought to pass. And the only question to be decided was whether the money had been paid. If the money had been paid by Matthew Lyon, it seems to follow, as a matter of course, that it ought to be repaid. *He believed with the gentleman, that the Treasury ought no longer to be contaminated—no, not for a single day, by money drawn from the pockets of the patriot, and placed in its vaults.*" (Pg. 413).

Many more expressions to the same effect, that the law was unconstitutional, could be quoted. But the report which was adopted, and the almost unanimous vote, makes this unnecessary.

This particular claim came up on a former period, and it was opposed in the Senate by some, because proof of actual payment was not at that time made.

John J. Crittenden was one of the most exalted statesmen and lawyers the United States ever produced. Governor of his State—six times appointed and elected to the Senate—a record, I believe, unequaled—and twice Attorney General of the United States, in which position, as in the Senate, he occupied a front rank. In fact he is ranked with Randolph, Wm. Wirt, Reverdy Johnson, Jere Black.

It may be added, starting a Democrat, he was afterwards a Whig, and in the statement which follows, he not only uttered the sentiments of the Democratic Party, which was brought into existence by opposition to the Sedition Law, *but also the universal opinion of the Whig Party including Clay and Webster on the same subject. Can any Court reject the unbiased opinion, even in times of excitement, of such an authority?* He said:

“I consider the Sedition Act as having *been unconstitutional, not only from a defect of power in Congress to pass such a law, but because its passage was expressly forbidden by the Constitution.* The sense of the nation had

unquestionably pronounced it unconstitutional, AND THAT OPINION BEING GENERALLY ENTER-TAINED, IT OUGHT TO BE SOLEMNLY PRONOUNCED BY THE LEGISLATURE, THAT HISTORY AND THE RECORDS OF THE COUNTRY MAY NOT HAND IT DOWN TO POSTERITY AS A PRECEDENT FOR ACTS OF SIMILAR USURPATION. If a revision of that proceeding in that case was important in a public point of view, it was certainly so as it related to the individual who was the subject of prosecution under that act. TO EACH OF THEM, AND TO EVERY CITIZEN OF THE UNITED STATES, THE CONSTITUTION OF THE UNITED STATES HAS GUARANTEED CERTAIN RIGHTS WHICH HAVE BEEN VIOLATED BY THAT LAW.

“Mr. Crittenden felt himself bound to reply to some observations which had been made. The public voice had determined the unconstitutionality of the Sedition Law. *It had removed one party from power, and elevated another.* He had expected Congress would confirm the decision of the people. He would be sorry if he were disappointed; BUT IT WOULD BE A GREAT CONSOLATION THAT THE OPINION OF THE NATION WAS WITH HIM. THE PROPOSITION, THAT THE LAW WAS UNCONSTITUTIONAL, APPEARED TO HIM SO PLAIN, THAT HE FEARED AN ATTEMPT AT DEMONSTRATION WOULD INVOLVE IN DARKNESS A QUESTION AS CLEAR AS SUNSHINE.”

Here we pause! Every patriot and especially everyone who carries Revolutionary blood and with it the Revolutionary spirit should remove his hat and bow down in reverence to this sentiment,

of this great lawyer, in whose veins there ran the greatest Revolutionary blood and who lived true to the faith. Men take off their hats to the flag. But the flag is a mere outward emblem *which says that "the Constitution is here; that it is the supreme law and if not violated protects the public and restrains the most powerful."* But if freedom of speech does not exist; if the right of free discussion of public matters—correctly or incorrectly, just or unjust—then *the Constitution does not prevail.*

The writer of this brief is consoled "*That the opinion of the nation is with him,*" in his demands that the Constitution shall be respected and upheld. Those who brought this law forth will be held to account hereafter. Although he confesses, with shame, that through fear of dungeons, from this Espionage Bill, they remain silent. I carry the blood of men who shed blood and wore chains on the British Prison ships to establish this right, and I shall not remain silent, and especially at the command of men who carry no Revolutionary blood, and who hold to no Revolutionary principles.

Continuing Senator Crittenden said:

"The Constitution says: 'Congress shall pass no law abridging the freedom of the press.' *If this law did not abridge that freedom, why was it passed?* No law of the General Government then existed on the subject. The State authorities alone took cognizance of libel. That the Constitution was meant as a mere moral

restraint, was a novel idea. The Convention who framed it was not a Convention of Puritans, but an assemblage of statesmen. The morals of a nation were left to other tribunals; political motives alone led to its formation and adoption, and to the provisions referred to. *The framers of it well knew that the licentiousness of the press was not as much to be feared as the power to restrain its freedom. History was full of examples on this point. Our Government was different from all others in its principles, objects, and provisions. The press so far from being dangerous to it, was its greatest safeguard. No ruler was above its animadversions, nor beyond its influence. Tyrants, all over the world, dreaded its effect in imparting light and energy to the human mind. But what had our Government—a Government of the people—to fear from it? It could not injure, it could not affect it. Experience had verified it."*

(15 Congress (in the Senate) Vol. 1, pg. 48).

Senator Barbour long represented Virginia in the Senate, Governor and Minister to England. He said at the same time, in the Senate.

"This, he thought, was a propitious moment to retrace the former steps, in deference to the opinion of the people, and erect a barrier against the recurrence of *similar aggression of power on inherent and constitutional rights*. This, he said, was not the tribunal to take cognizance of judicial delinquency; that was the province of the other House. But

it was quite within the power of this Body, as one Branch of the Legislature, to pronounce that those who gave the authority exercised by the Judiciary, had no right to do so, and that, therefore the Judiciary had proceeded unconstitutionally in executing the law, the Constitution being the paramount law. * * * He would not, he said, act indelicately towards the Judiciary, or any member of it, but, in regard to the violation of the Constitution, in the passage and execution of the Sedition Law, a tribunal from which there was no appeal had *decided on it. There was among the people, at this day (1820), scarcely a dissenting voice on that subject.* The Sedition Act was one of the most conspicuous among the Acts of misrule, in consequence of which the party who then held the reins of Government was precipitated from power. *The law was unconstitutional, and Congress ought to say so, and repair the ravages made under color of its authority.*"

(Vol. 1, Congress 1818-19, pg. 4850).

The celebrated Senator Macon, of North Carolina, said:

"The Gentleman from Massachusetts (not Webster) admits the inexpediency of the law, but not its unconstitutionality. This was itself a great concession. *Would he put his finger on the clause of the Constitution which authorized that law?* He would not impute evil motives; he had nothing to do with them, but with Acts. * * * That gentleman thought it might do any act necessary to its preservation. He, Mr.

Macon, believed it could not go beyond the Constitution. We have in this country two governments. The Constitution defines the powers of the General Government, and leaves the State Government untouched. He thought the position clear, *that if there was no Constitutional power that passed the law*, the money was taken wrongfully, and ought to be restored."

(Vol. 1, Cong. 1818-19, pg. 4850).

Anthony Haswell, a native of England, was convicted. He died May, 1816. In 1844 another Congress refunded to his representatives the fine imposed upon him with interest for forty years.

So Thomas Cooper was convicted. In 1840 Congress refunded the fines with interest and again declared the law unconstitutional. It was believed to have been done in every other case of conviction, and in each the Act condemned and declared unconstitutional.

In 1804 the House of Representatives impeached Judge Chase for his conduct in some of these cases. Eighteen Senators voted him guilty and sixteen not guilty. Every one of the last were Federalists who lingered yet for a while. He escaped because of age and service in the Revolution and the votes of Federalists mainly who had voted for the law. If tried a few years later he would have been probably convicted.

HISTORICAL FACT TEN.

IN NO WAR BEFORE HAS AN ESPIONAGE BILL BEEN THOUGHT NECESSARY OR EVEN CLAIMED TO BE A POWER INCIDENT TO WAR AND LAWFUL.

During the Civil War and all of the internal disorder growing out of it, there was no claim by President or Congress of a power to control the press. Neither claimed power to pass Espionage Bills. Men were arrested by military authority, and the only power claimed was that of martial law. None were tried in the civil courts; and afterwards these arrests were uniformly held by the courts to have been illegal. *In a word, Mr. Lincoln and the Congress did not discover the alleged authority now being asserted.* And McClelland in 1864, ran for President on a platform demanding peace and an end of war. A free discussion and canvas followed.

RECAPITULATION OF THE ABOVE.

That a bird's eye view may be presented of these historical facts, unquestioned in our history, and any one of which shows, incontrovertibly, that Congress has no power whatever over speech or press, we here present a brief recapitulation.

First: The Convention itself, that framed the Constitution, solemnly resolved that they were giving *no such power.*

Second: The State Conventions, in ratifying the Constitution, did so with the clear understanding of every one at the time, who were called upon to act on the subject matter, that they ratified the Constitution *with that express understanding of its meaning.*

Third: That the Federalist, written by two leading members of the Convention, an authority unquestioned by all, is recognized to have secured, largely, its ratification, expressly assured the people they were giving to the General Government *no power whatever over Speech and Press.*

And it is also unquestionably true that, but for this belief, *not a single State would have ratified the Constitution,* so hostile were the people to taking this power from their own State Governments, and transferring any power over the subject to Congress.

Fourth: That to put the matter beyond controversy, they requested, and Congress submitted the First Amendment, which was adopted *by every State, in the belief it denied all powers.*

Fifth: That no provision was made for the truth to be given as a defense; or the jury to be the judges both of law and fact. This great reform was adopted in England in 1792 (after a long contest extending for years), had even been incorporated into State Constitutions, and the absence of such provision in the Federal Constitution, is abso-

lute demonstration that no power over speech and press was given.

Sixth: The old Federalist party passed the Sedition law. Jefferson and Madison put forth the celebrated Resolutions which were adopted by the States of Virginia and Kentucky—nearly all of the others being under Federal control. These brought into existence the Democratic party, built upon the cornerstone that *no such power was given*. On this declaration Jefferson was elected, so was Madison and Monroe; the Federal party, that asserted the contrary doctrine, passed out of existence, all of the New England States even went from the Federal to the Democratic doctrine on this subject. *And this view of the Constitutions remained as the settled construction down to 1917.*

Seventh: This doctrine has been the settled policy of the American people; of all parties; of all sections, and of the Federal Government itself.

Eighth: Jefferson being elected, on this issue of no such power to pass any law on the subject, in the words of Jefferson, "good or bad." Mr. Jefferson turned out all persons then in prison, and declared that their conviction was no more legal than if they had refused to worship a golden image.

Ninth: Both Houses of Congress afterwards—practically unanimously—decided that such laws were unconstitutional and void, and refunded to all

parties, or their heirs, the fines paid, with interest and costs (turn to Historical facts 9, this Brief, for review of these proceedings).

Tenth: In no war since has it ever been claimed, by any party, that there was any power to pass any Act in any way controlling the press, as an incident, either to the war power or the power to raise armies. None such was passed during the Civil War. And the Democrats in 1864 were allowed to make a canvass demanding peace. This demand for peace, made in 1964, with war in our midst, if made now would lead to prison, with war 3000 miles distant.

Here are the historical facts.

I SAY TO THE COURT AND THE PEOPLE, HERE ARE THE HISTORICAL FACTS. IF THEY CAN BE OVERTHROWN NOW AFTER MORE THAN 115 YEARS OF UNIFORM CONDUCT; AFTER THE SOLEMN DECLARATION OF BOTH THE EXECUTIVE AND LEGISLATIVE BRANCHES OF THE GOVERNMENT; AFTER ACQUIESCENCE OF THE PEOPLE, THAT THEY ARE UNCONSTITUTIONAL, THEN THE DECLARATION OF INDEPENDENCE CAN BE ANNULLED AND OVERTHROWN, AND IT CAN BE DECLARED BY CONGRESS THAT THE FORMER COLONIES ARE NOT, AND NEVER WERE "FREE, SOVEREIGN AND INDEPENDENT STATES," BUT ARE NOW AND EVER HAVE REMAINED BUT COLONIES OF GREAT BRITAIN.

If these facts are not conclusive, then it is idle to adduce argument. It is no more historically and

legally established, by both people and Government, that the Colonies became independent States, to whom individually descended all power over speech and press, than it is established that to the Government of the United States, created for interstate and foreign purposes alone they did not surrender, and would not surrender any power whatever over speech and press. They established a General Government, one object of which was "to secure the blessings of liberty" and it is established, as well as any other fact in our history, that had they given the power now claimed to *exist*, they would, *in their estimation have established a despotism. Then did they do so?* So, it is the crucial test in determining what they did, that these people who framed and adopted this Constitution, *thought that to vest any power in the Federal Government over speech and press, was both foreign to its purpose, and despotic in character.*

I challenge Presidents, Ex-Presidents, members of the Senate and House, to bring forward the evidence that will controvert any of these historical facts, or any of the conclusions stated above, *and especially the last.* If they cannot, *then the law stands condemned, as its authors, and those who enforce it, will be condemned in future ages. History must be reversed and expunged, or this law is usurpation.*

For instance, all the New England States were then Federal, and repudiated the position of the

Democratic party; and in answer to the Virginia Resolutions affirmed the validity of the law. The people of those States *repudiated their Rulers, and elected Democratic administrations upon the very issue that the Sedition law was void and Congress had no power over speech and press.* Massachusetts formally protested against the views of Virginia, and affirmed the right of Congress. There were but three Democrats in her Legislature, one of whom was Mr. Story. The State became Democratic, and Joseph Story, afterward a member of the Supreme Court, became Speaker of the House, and was elected to Congress *upon the distinct issue that Congress had no power over speech and press.* Massachusetts repudiated her great son, John Adams and embraced Jefferson in this question. Invitations showered upon Mr. Jefferson to visit Democratic New England. To Governor Sullivan of Massachusetts he replied, Volume 4, page —:

If we look at history, nothing but arbitrary power remains to support this law. Mr. Jefferson said of the election of 1800, "It was a Revolution, by which the nation returned to the principles of 1776."

And here the question might be safely left to rest, but for the fact that a party, strangely calling itself Democratic, has now adopted the principles, and gone far beyond the Federalist. Nay, they have gone beyond the common law—to abolish which, forms one of the most notable instances of the struggle of the English Whigs for freedom. And have

adopted, especially in the methods employed in some of the courts to secure conviction, the principles of the Star Chamber; and those of Jefferies to secure the conviction of Lady Lyle, have been atrociously repeated in America, in some cases.

The President has ordered the clocks to be turned up one hour and thus changed the meridian. Espionage bills have turned back civilization and liberty five centuries.

Having shown the want of this power as a question of Historical Facts, I now proceed to discuss *it as a legal question* in the light of the provisions of the Constitution and of authority.

THERE IS NO CONSTITUTIONAL POWER IN CONGRESS OVER THE SUBJECT OF OPINION, SPEECH AND PRESS.

On the above subject, I adopt the clear statement and argument of Mr. Madison in his celebrated Report. As a clear, unanswerable legal argument this has never been excelled. In its direct effect upon the future of American institutions, it has never been equalled, except, perhaps, by the Emancipation Proclamation and the Thirteenth amendment. It is deeply regretted that the short time allowed for the preparation and printing of this brief, the very limited means of the plaintiff in error, who is fighting the battles of American freedom, that this entire Report cannot be printed. We

respectfully ask and urge the Court to read it, or at least that part of it referring to this subject, and commencing Elliott's Debates, Vol. 4, page —. No other argument is now necessary. It then saved the Constitution in 1800, "in its last" gasp, as said by Mr. Jefferson. It completely silenced "the wind bags" of that period, as those were termed by Mr. Jefferson, who supported the Sedition law. If the same spirit at present prevailed, it would now save the Constitution, as it lies prostrate and discarded by those who swore to uphold and support it. When the argument of that Report demonstrating by the man who started the movement to frame the Constitution and assisted to frame it, that Espionage laws are unnecessary can be answered by Courts or Attorneys, they can stay the ocean's tide; nay, the revolution of the earth itself upon its axis.

It drove from power the old Federalist party and its leaders. It brought disgrace to honored names. The son of John Adams, who signed it, and the son of the first Senator, Bayard, the most able advocate of the measure, abandoned their Fathers' faith. It created the Great Democratic party, and it will drive from power a spurious party who have forgotten the faith of the fathers and retain only the hollow name, to disgrace it. It ended the contention, that the Common Law was a part of the jurisprudence of the United States, and in doing so it conferred a greater benefit upon this country than ever conferred by any other Act in its history.

And as a result it established the principle that a General Government, a Government for foreign and inter-state purpose had no power over the Speech and Press of the people of the several States.

We request again, that the Court read that Report, and let the Court follow in its footsteps, or show, what no man at that day was able to show, that it is wrong.

As said, it firmly fixed in the jurisprudence of the United States that the Common Law was no part of that jurisprudence, as decided by this court.

United States v. Hudson, 7 Cranch, 32 (1812);

United States v. Wheaton, 4 Wheaton;

Perser v. Whitney Bridge Co., 13 Howard, 619;

United States v. Reese.

In the first case it is said, "Although the question is brought up now for the first time, to be decided by this Court, *we consider it as having been long since settled in public opinion.*" Will the same Court now repeat that law; for in deciding that question the public decided that no power existed in the United States over Speech and Press. It was in deciding this last, they decided the other and the Court has nothing to do but announce that decision—a decision by practically the same people who framed and adopted the Constitution.

In no other case, for many years, has this jurisdiction been asserted, and general assuiescence

of legal men shows the prevalence of opinion in favor of the negative of the proposition. And here Espionage bills fail but for the invention one class of men to establish slavery by circumventing another class of men who by clear provisions of a definite Constitution secured liberty.

And it is very important to remember this fact. The Sedition law, or the alleged power of Congress over speech and press, at that time was almost entirely based upon the contention that the Common Law was a part of the law of the United States. When this completely failed, then the main alleged support for the authority fell, and it is the merest pretext now to claim, as it was never claimed in any other war, that this control of speech and press "is necessary and proper" to *raising armies and declaring war*. WHERE HAS THIS DOCTRINE, if it not purely imaginary, *laid dormant down to 1917*? Under the Sedition law it was feebly put forth as "necessary and proper" to *the suppression of Insurrection*. In the War of 1812; in the Florida War; in the Mexican War; in the Civil War; in the War with Spain, no one claimed this power over Speech and Press as "necessary and proper" to the war power, or of raising armies. This view was first advanced by the present Congress and Mr. Wilson. This is the *first European War*, and the *first* it is thought necessary to silence *the voice of the people*. *It is wise to stop, reflect, and ask: WHY IS THIS?*

I challenge the production of *the reason for this*

drastic law, silencing the voice of the people, in a Government built on the consent of the governed, and prohibiting them from discussing all matters connected with the European War. Is it because that if the people are not silenced by its terrors, that they will not endorse the measures of this Administration, so opposed to the pledges in the election of a Congress and President. If this is not the reason, then let a reason for a measure so extreme, and so unprecedented, be stated. No reason has ever been given. And if this is the object, then is it a worthy object? Had not the people a right to discuss this war, as they have a right to oppose or endorse every other measure of Government, as preparatory to a decision of matters at the ballot box? No. Conscription must be ordered. Not by Congress under its sole power to raise armies, but this vast power was delegated to the President "when and how he should order." Next, *the right to discuss this* and all measures was then taken from the people. And the question now is, for the Court to decide: SHALL THE RIGHT OF THIS DISCUSSION BE RETURNED TO THE PEOPLE?

Give me, said a philosopher, a fulcrum, and I can move the earth. *Give to mankind an efficient means to compel men to keep written Constitutions,* the expression of the Sovereign will, as their only authority, and the difficulties which have ever surrounded the preservation of free Government and made political slavery and not freedom the rule will

be removed and liberty will remain triumphant forever. The explicit mandate of the Constitution and injunctions of religion have both failed to preserve the sanctity of oaths.

Today, in our country, the troubles which confront us, threatening with destruction every right dear to man, and secured by our ancestors, does not arise from the impotent hovels. It arises from palaces and men in high places, and who have power behind them, who have set lawful authority aside and swearing to support Constitutions, *unblushingly proclaim Constitutions are suspended*. If so, so also are oaths suspended. These gentlemen had better take warning by the past. Mr. Charles Francis Adams—learned and cultured—felt in the third generation, the sting arising from Espionage bills. He seeks to remove the odium attaching to the great name of his Grandfather—a true patriot in the War of the Revolution—odium arising solely out of the fact that he signed and enforced the Sedition law. He says, in the words of John Adams that he did not endorse the bill. He signed it, and he enforced it, and Charles Frances Adams says that Hamilton is responsible for it and advocated it *in private*. There is not a particle of evidence to sustain Mr. Adams, in either of these assertions, either as to Hamilton or Adams. John Adams denounced, in unmeasured terms, Hamilton. He even wrote, long after the latter's death, that he was "the bastard brat of a Scotch Merchant"; when charity

had thrown oblivion over this, for which Hamilton was not responsible, and which he overcame by his great genius. Yet, John Adams did not make the charge made by his grand son.

And today the testimony of Jefferson, the Author of the immortal Declaration, the testimony of Madison, the Father of the Constitution, and the testimony of Alexander Hamilton rise up as a trinity as it rose up in 1800, against this iniquitous law, and we need men carrying Revolutionary blood, and patriotism to bring forward their principles, in the face of the men who have fastened this despotism upon the American people. It is time that some one should speak out in the Capitol boldly in defence of the Constitution and the rights it secures to the States, and the people as individuals.

When Doctor Waddell, the eloquent blind preacher, whom Wirt has immortalized in the "British Spy," visited England, George the III, attended one of his meetings. He created some disturbance. Doctor Waddell, shaking his finger at him, said, "When the lion roareth the beasts of the field tremble; and when the Lord speaketh, let the Kings of the earth remain silent." The King the next day sent him a large donation for Hampden Sidney College and wrote, "I like to hear the voice of an honest man sometimes." It should be heard upon this Espionage bill.

After these somewhat desultory remarks, we

return to the subject directly and to Mr. Madison's Report.

GROUNDS UPON WHICH THE SEDITION LAW WAS
 JUSTIFIED IN 1797.

The most notable and convincing argument at the present is that though the country had entered upon an incipient war with France at that time, and they had authorized the raising of an army, and had appointed Washington Commander in Chief, with Hamilton and Knox as Major Generals, *no man claimed the power to pass the Sedition Law as an incident of the war power.* This is the claim now put forth. That it is now discovered shows that it is purely imaginary.

That claim has been left dormant until the present administration. *Strange, marvelous indeed if true!* That there were great lawyers, greater than now perhaps, and no single man on either side at that time, claimed that power over Speech and Press was "necessary and proper" *as an incident to the war power.* This shows conclusively that those who seek to exercise arbitrary power are ever fertile with inventions to ease their conscience and shackle the people. And these inventions arise as occasions make them necessary.

Hamilton, true to his opinion, expressed in the Federalist, denounced the Sedition Law and wrote:

Let us not establish tyranny; energy is a very different thing from violence. If we make no false

steps we shall be essentially united, but if we push things to the extreme, we shall then give to faction body and solidity." June, 1798.

5th Hildreth's History of the U. S., p. 225.

He here says, Sedition law is "tyranny" and will bring division. Espionage bills have brought in our day, both division and tyranny.

LAWS "NECESSARY AND PROPER" TO CARRY OUT EXPRESS POWERS.

Here is the other claim for legality, feebly put forth to sustain the Sedition law, and now put forth as the only pretext for authority.

The report referred to discusses that matter at length, which we in part here produce as worthy of careful consideration:

"From the review thus taken of the situation of the American colonies prior to their independence; of the effect of this event on their situation; of the nature and import of the Articles of Confederation; of the true meaning of the passage in the existing Constitution from which the common law has been deduced; of the difficulties and uncertainties in extending the powers of the Federal Government, and in superseding the authorities of the State Governments,—the committee feel the utmost confidence in concluding that the common law never was, nor by any fair construction ever can be, deemed a law for the American people

as one community; and they indulge the strongest expectation that the same conclusion will be finally drawn by all candid and accurate inquirers into the subject. It is, indeed, distressing to reflect that it ever should have been made a question, whether the Constitution, on the whole face of which is seen so much labor to enumerate and define the several objects of Federal power, could intend to introduce in the lump, in an indirect manner, and by a forced construction of a few phrases, the vast and multifarious jurisdiction involved in the common law—a law filling so many ample volumes; a law overspreading the entire field of legislation; and a law that would sap the foundation of the Constitution as a system of limited and specified powers. A severer reproach could not, in the opinion of the Committee, be thrown on the Constitution, on those who framed, or on those who established it, than such a supposition would throw on them.

The argument, then, drawn from the common law or the ground of it being adopted or recognized by the Constitution, being inapplicable to the Sedition Act, the committee will proceed to examine the other arguments which have been founded on the Constitution. * * *

The plain import of this clause is, that Congress shall have all the incidental or instrumental powers necessary and proper for carrying into execution all the express powers, whether they be vested in the Government of the United States, more collectively, or in the several departments or officers thereof.

It is not a grant of new powers to Con-

gress, but merely a declaration, for the removal of all uncertainty, that the means of carrying into execution those otherwise granted are included in the grant.

Whenever, therefore, a question arises concerning the constitutionality of a particular power, the first question is, whether the power be expressed in the Constitution. If it be, the question is decided. If it be not expressed, the next inquiry must be, whether it is properly an incident to an express power, and necessarily to its execution. If it be, it may be exercised by Congress. If it be not, Congress cannot exercise it.

Let the question be asked, then, whether the power over the press, exercised in the Sedition Act, be found among the powers expressly vested in Congress. *This is not pretended.*

Is there any express power, for executing which, it is a necessary and proper power?

The power which has been selected, as least remote, in answer to this question, is that 'of suppressing insurrections;' which is said to imply a power to prevent insurrections, by punishing whatever may lead or tend to them. But it surely cannot, with the least plausibility, be said, that the regulation of the press, and punishment of libels, are exercises of a power to suppress insurrections. The most that could be said would be, that the punishment of libels, if it had the tendency ascribed to it, might prevent the occasion of passing or executing laws necessary and proper for the suppression of insurrections.

Has the Federal Government no power,

then, to prevent as well as to punish resistance to the laws?

They have the power, which the Constitution deemed most proper, in their hands for the purpose. The Congress has power, before it happens, to pass laws for punishing it; and the executive and judiciary have power to enforce those laws when it does happen.

It must be recollected by many, and could be shown to the satisfaction of all, that the construction here put on the terms 'necessary and proper' is precisely the construction which prevailed during the discussions and ratifications of the Constitution. It may be added, and cannot too often be repeated, that it is a construction absolutely necessary to maintain their consistency with the peculiar character of the government, as possessed of particular and definite powers only, not of the general and indefinite powers vested in ordinary governments; for, if the power to suppress insurrections includes the power to punish libels, or if the power to punish includes a power to prevent, by all the means that may have that tendency, such is the relation and influence among the most remote subjects of legislation, that a power over a very few would carry with it a power over all. And it must be wholly immaterial whether unlimited powers be exercised under the name of unlimited powers, or be exercised under the name of unlimited means of carrying into execution limited powers.

If, on the other hand, Congress are not limited, in the choice of means, by any such appropriate relation of them to the specified

powers, but may employ all such means as they may deem fitted to prevent, as well as to punish, crimes subjected to their authority, (such as may have a tendency only to promote an object for which they are authorized to provide), every one must perceive that questions relating to means of this sort must be questions for mere policy and expediency; on which legislative discretion alone can decide, and from which the judicial interposition and control are completely excluded." Madison's Report IV, Elliott 568 and ante.

And the true meaning of the above claim, as set forth above, *is exactly the same* as Hamilton in the Federalist No. 31, and Madison in No. 43 told the people, at the time, it meant. But for the lack of time these passages would be set forth in full. The Court, and others, are asked to read these Numbers. They *are inconsistent with* the construction, and powers now claimed, under the general claim. Thus showing the Constitution was adopted with no such meaning as now claimed.

CONCLUSIVE EVIDENCE THE ESPIONAGE ACT UNCONSTITUTIONAL.

There were great lawyers then in the Federal party. Mr. Madison discusses every one of the legal grounds to justify the Sedition or Espionage Bill claimed that day. These were the common law and the suppression of insurrection. *And no one*

then claimed it as an incidental power, and "necessary and proper" to the power to declare war and raise armies. Yet then Congress had just raised an army, and was about to enter upon war. The claim now is, therefore, mere pretext, and as groundless "as the fabric of a dream." All this is explained elsewhere but may be stated here.

For the assertion simply amounts to this, if true; That here is a Constitutional power, unknown to the men who framed the Constitution, and the lawyers of that period, as an incident to the war power, but now discovered by the President and his advisers.

Is a Restraint on Speech and Press "Necessary and Proper" to the exercise of the war power or the power to "raise and support armies?"

It is now so claimed, and I now notice this in respects not expressly named in Mr. Madison's Report above, for the reason that new grounds are put forth as to their legality not occurring to their predecessors—the old Federalist Party. What a change! Wilson and Congress abandon the principles of Jefferson, and stand squarely on those of John Adams and the Federalists.

If a Court was informed a juror was not present because dead; next blind and could not hear; next a woman; next, when summonsed, confined in

a lunatic asylum, the Court undoubtedly would say the first, or any of the other reasons, was sufficient.

This is an exact statement of this question of the control by Congress of Speech and Press as "necessary and proper" to carry out an express power. If this interpretation was true, the following would be the result:

First: So applied, it would transfer from the State every single power. This would entirely change the whole structure, and instead of a Federal union, between States, we would go to a great single State.

Second: If the power is incident to that of raising armies and declaring war, it is also incident and lawful, in the execution of every other power, set forth under Article 1, Section 8. The general clause is not special, but general; and applies to all "the foregoing powers," and to every other power vested in the Government, and in every Department.

Third: In fact, so far from the interpretation claimed being true, the clause vests no power whatever, but announces a rule that would exist in the absence of a clause, except it requires means that are first necessary, next proper. If "necessary" but not "proper;" or, if "proper" but not "necessary" the means are unlawful. See Federalist Number 31 and 43 and Madison Report above.

Fourth: The Constitution was adopted with the distinct understanding *it did not bear the interpretation now claimed*, for the general clause. That it was so adopted is as clear as any other fact in our history; and being so adopted, with that understanding, another cannot now be attached to it. It was introduced, by Luthur Martin, hence could not bear the interpretation now claimed, for no man was ever a more extreme advocate of the limited powers of the General Government and reserved rights of the State. Besides he knew its scope for he was as great a lawyer as lived in the United States.

To those who have an acquaintance with our Constitutional history, the above propositions call for no exposition. They are both axiomatic and invincible. Perversion, or departure from settled principles, now only involves the question in doubt. So an effort will be made to amplify them. As to the first two, let it be said the powers of the General Government must be found in the Constitution. It delegates, and expressly names certain powers, and for greater security alone, expressly reserves *all others to the States or people*. If then the regulation of Speech and Press is legal, under the general clause, as an incident to raising armies, and declaring war, and as being "necessary" and "proper" thereto, it then follows, that under the same clause, the regulation of Speech and Press *is lawful in carrying out all of the powers found in*

Article 1, Section 8; and all other powers vested in either branch or the Departments. The language of the clause is all "powers necessary and proper to carry out *the foregoing powers*."

WHAT DO THE ABOVE WORDS MEAN AND SCOPE?

"Congress shall have power to lay and collect taxes; duties on imports, etc." In executing this power it may both "lay" and "collect" taxes, in pursuance of the other clauses. It may fix and regulate duties; appoint the proper officers to value the imports; collect all duties and taxes; build custom houses; and in fact do every other act clearly connected with and "necessary and proper" to fully execute this power. But can it regulate the Press, as connected with the execution of this power? Suppose if Congress lays high duties "for protection." Can it punish, as Sedition, or anything else, articles which claim that the tax is too high; that it is oppressive, and that protection is unwise, and unconstitutional? Can articles urging that a tariff to raise revenue, is the only proper and legal tariff, be declared Sedition and be made a felony? Or on the other hand, if a tariff for revenue only is passed, may those who advocate a contrary system be convicted of sedition, for urging their views? It is perfectly plain, that if the words *necessary* and *proper* have the meaning now attached to them, and applied to the power of declar-

ing war and raising armies, so such Espionage laws may, also, be passed to cover the above subjects.

Congress has power "to coin money and regulate the value thereof." It may therefore, as "necessary" and "proper" to this power, erect mints, buy land on which to build them; pass a Coinage Act, fixing the standard of value; fix the ratio between the metals, and do every other act directly necessary to carry out this power. And it is very essential that there be no uncertainty, or impairment of the coin. If Congress adopts the gold standard, can it punish the demand for the free coinage of silver, or that treasury notes should not be of legal tender, and persons be compelled to receive them in payment of debts? *If the construction of necessary and proper as now claimed in support of the present bill be the correct one, all these matters may also be regulated. For no doubt should be cast on the coin, or validity of all the obligations of the Government.*

Congress has also power to pass a Naturalization Law. Can all discussion, showing that certain people should be excluded which if acted on would lead to complications with Foreign nations be forbidden? This can be done if the present Espionage Bill, can be sustained on the grounds suggested.

So treaties may be made and if the regulation of the Press is an incidental power, then it may be unlawful for the people to discuss these measures, because such discussion may bring about confusion.

The men who framed the Constitution did not put in it any such jargon. That is certain.

Without extending these special references further let it be remembered, as covering the whole ground, that this general clause applies to every single power as clearly as if added at the end of each and made a part thereof.

"It may be affirmed, with perfect confidence, that the Constitutional operation of the intended Government would be precisely the same if these clauses (necessary and proper and Supreme Law) were entirely obliterated." Hamilton Federalist No. 31 "Had the Constitution been silent in this head" sets out at length it would mean the same. Madison Federalist No. 43. And he says of the very construction now claimed that in discussing it "that moderation itself can scarcely listen to these railings." And "*these railings*" were simply that in time usurpers would arise and twist the true meaning just as is now being done.

Therefore the regulation of Speech and Press as necessary and proper to one power, in order to carry it out makes it lawful as a means to carry out every other power possessed by the Government.

That this rule then, if given its legitimate scope, as now insisted on, annihilates *every power of the States*, and converts the United States into an absolute Government, is too plain for question. Congress, by way of illustration may assume jurisdiction over all the State highways, regulating their

width and conduct. For armies and mails must pass over them and the people must not discuss adversely the Government regulation. Nothing remains to the States.

But more than this. Though no express power is given over Speech and Press; and though it is claimed that the first Amendment does not prevent all laws on the subject, but only such as infringe the freedom of Speech and Press, this rule gives absolute control over Speech and Press. As said by Mr. Madison in his Report (4 Elliott 568) "It must be wholly immaterial whether unlimited powers be exercised under the name of unlimited powers, *or be exercised under the name of unlimited means of carrying into execution limited powers.*"

And let it here be impressed: "If power is vested, the discretion of Congress in the premises cannot be controlled.

Let this be made plain by example. Congress has no power whatever to prohibit a State bank of issue. The States have reserved the right to charter such banks. Yet during the Civil War, under the alleged power to collect taxes and excises, Congress imposed an annual tax of ten per cent on the issue of State banks. In the *Vesie* case, this is held to be valid, *though no revenue was ever collected under it and none whatever can ever be.* The Court said, *it must presume* Congress intended to collect revenue, though it appeared none could ever be collected. It is so with the Henderson Drug Act, which

will never collect any revenue, though professed to be a measure of that character? It hardly pays the fees for issuing the license. Many other instances could be cited, where Congress having power, *its discretion will not be controlled.*

So if it is "necessary and proper", in the estimation of Congress, to pass a bill, controlling Speech and Press, in carrying out one power, it is also lawful, if Congress so decides, *in carrying out all other powers.* So that this doctrine takes from the people every single right intended to be secured by the Constitution; makes of Congress an absolute body, and lays at the feet of Congress everything. The result is this, that by this simple device everything is placed under the control of the Government at Washington.

Why, let it be asked frame a Constitution, at all, and carefully set out the powers given? The clause reads; "Congress shall have power to pass all law necessary and proper, *to carry out the foregoing powers*", etc. Under the contention now put forth, *all of the named powers should have been omitted,* and a simple provision to the effect. "Congress shall have all power." For that is the effect established by the construction now claimed.

As explained by Mr. Madison elsewhere, we framed a Government on the reverse of the British theory. There Parliament, to use its own words is "transcendent." This rule also makes our Congress "transcendent." *If the present claim is true,*

we pass from the American to the British theory, excluded by the Revolution, and the Constitution.

I defy anyone to overthrow any of these propositions, if the premises claim in support of the Espionage Bill are conceded.

Again, every single clause of the Constitution is equally the supreme law, each stands upon an equal footing.

In fact may not sedition and riots be induced equally by discussion of all public questions. The discussion of war and armies, furnishes, in this respect, no exception whatever, nor does it vest any additional powers over Speech and Press. *In fact if any distinction can be made, the people should be allowed much more freely to discuss everything pertaining to the war, because it involves not only the revenue, but it involves the lives of sons, husbands and brothers, besides unusual expenditures and unusual opportunities for fraud and corruption.*

And thus on the very ground suggested as legalizing these measures, as to preventing enforcement of the two powers indicated, Espionage bills may become general—in fact they soon will become general as applied to all public subjects, and thus the lack of power in the Constitution and the restriction of the Amendment, be completely repealed.

SECOND: *And on a line with the above suggestion as to all other questions, that of war and*

peace, ought to enjoy the freest discussion for another reason; for surely the people, if they do not want war should be allowed to say so, and to urge peace, and to elect the Congress and a President pledged to peace. Both peace and war are lawful under the Constitution, and peace can never become unlawful, though Espionage Bills attempt to make it so.

It was said by Ellsworth (afterwards Chief Justice) and others in the Convention, that the way to make peace should be easier than to declare war. *If the people have a right to go into war, they ought to have a right to get out.* But how can they, without the right of free discussion? Take the present situation: The President and Congress were elected to give us peace. But elected, contrary to election pledges, war has come; and if the people cannot discuss the matter, how can they secure the blessings of peace, even though they almost unitedly demand it? Espionage bills consign the people to war, though they may want peace. In fact they are founded everywhere on a distrust of the people.

And as illustrating this truth, the Defendant wrote a harmless essay to which no objection was raised except the two concluding words. In the way of advice to the warring nations, which of course they never saw, he said "cease firing." For this he got ten years imprisonment. A few months after the people went wild with joy because they "ceased firing."

Therefore the Espionage Bill is unconstitutional, because Congress, (the President and Senate) can lawfully negotiate peace; therefore a sovereign people have the right to discuss its advisability, and to express an opinion as to whether their agents, the President and Congress, should negotiate peace. But by Espionage Bills, the President and Congress say, that if the sovereign people discuss it, they are guilty of felony, though they were elected on the distinct ground "they had kept us out of war" and would continue to do so. These officers then become omnipotent, and every feature of the Constitution is destroyed. They can continue war indefinitely.

THIRD: *The bill is void for the following reasons:*

The people have the right to elect a Congress, Representatives and Senators by Article I of the Constitution. Next they have a right to elect electors for President and Vice President.

The bill prevents a free canvass of the candidates for these offices, by preventing a discussion of all measures that they are to legislate upon. Especially is this true of those who have taken part, as members of Congress or Executive, in the measures of the war. And as the Espionage Bill takes away the right of the people to discuss the very matters upon which the men they are to elect to office, are to act, *it thereby destroys free elections itself.* For

why, if the people cannot discuss the public measures upon which those they elect are to act, why I repeat, *go through the mere formal ceremony of electing them?*

It can be seen at once that in that case Republican or representative government is destroyed, and those whom the people formally elect, are in fact, their sovereigns and their masters. A representative in Congress, or the Executive Office, is supposed to be but the representative or agent of the sovereign people; but under Espionage Bills they are the masters of the people. How can they make their wills, which is the Supreme law under the Constitution, known, if they are denied expression?

This point is so clear and so conclusive that an attempted exposition would be superfluous, but for the fact that it is seriously put forth; and in any event, so clear is it, discussion of it confuses.

A court, or people, who appreciate the fact that the people elect their officers, to legislate on public matters, yet cannot see that to inhibit discussion by the people of these matters, would not see this truth if God in bodily form appeared before them to testify.

For illustration: Congress appropriated \$640,000,000 to build aeroplanes. The money is gone, so says Mr. Wilson, and he asks for \$400,000,000 more.

It is said in Congress that while the money is gone, practically no air ships have been built. Why?

Yet all this important matter is not to be discussed, but is prohibited to the people.

Should Mr. Wilson become a candidate, as he may, no review of his acts as President will be the lawful subjects of adverse comment! *What sort of law is that for America?* It has its birth among the roving bands of Asia, and does not exist to-day in either Germany or England. But, notwithstanding this, and to impress this view, I again quote at length the clear and unanswerable observations of Mr. Madison—*clear and unanswerable if our Constitution is to remain, and we are not to go to an entirely different form:*

“On this part of the act, the following observations present themselves:

1. The Constitution supposes that the President, the Congress, and each of its Houses, may not discharge their trusts, either from defect of judgment or other causes. Hence they are all made responsible to their Constituents, at the returning periods of elections; and the President, who is singly intrusted with very great powers, is, as a further guard, subjected to an intermediate impeachment.

2. Should it happen, as the Constitution supposes it may happen, that either of these branches of the government may not have duly discharged its trust, it is natural and proper, according to the cause and degree of their faults, *they should be brought into contempt or disrepute, and incur the hatred of the people.*

3. Whether it has in any case, happened that the proceedings of either or all of those branches evince such a violation of duty as to *justify a contempt, a disrepute, or hatred among the people, can only be determined by a free examination thereof*, and a free communication among the people thereon.

4. Whenever it may have actually happened that proceedings of this sort are chargeable on all or either of the branches of the government, it is the duty, as well as the right, of intelligent and faithful citizens to *discuss and promulgate them freely*—as well to control them by the censorship of the public opinion, as to promote a remedy according to the rules of the Constitution. And it cannot be avoided that those who are to apply the remedy must feel, in some degree, a contempt or hatred against the transgressing party.

5. As the act was passed on July 14, 1798, and is to be in force until March 3, 1801, it was of course that, during its continuance, two elections of the entire House of Representatives, an election of a part of the Senate, and an election of a President, were to take place.

6. That consequently, during all these elections—intended, by the Constitution, to preserve the purity or to purge the faults of the administration—the *great remedial rights of the people were to be exercised*, and the responsibility of their public agents to be screened, *under the penalties of this act*.

May it not be asked of every intelligent friend to the liberties of his country, whether

the power exercised in such an act as this ought not to produce great and universal alarm? Whether a rigid execution of such an act, in time past, would not have repressed that information and communication among the people which is indispensable to the just exercise of their electoral rights? And whether such an Act, if made perpetual, and enforced with rigor, would not, in time to come, either destroy our free system of government, or prepare a convulsion that might prove equally fatal to it?

In answer to such questions, it has been pleaded that the writings and publications forbidden by the act are those only which are false and malicious, and intended to defame; and merit is claimed for the privilege allowed to authors to justify, by proving the truth of their publications, and for the limitations to which the sentence of fine and imprisonment is subjected.

But, whatever may have been the meritorious intentions of all or any who contributed to the Sedition Act, a very few reflections will prove that its baneful tendency is little diminished by the privilege of giving in evidence the truth of the matter contained in political writings.

In the first place, where simple and naked facts alone are in question, there is sufficient difficulty in some cases, and sufficient trouble and vexation in all, in meeting a prosecution from the government with the full and formal proof necessary in a court of law.

But in the next place, it must be obvious

to the plainest minds, that opinions and references, and conjectural observations, are not only in many cases inseparable from the facts, but may often be more the objects of the prosecution than the facts themselves; or may even be altogether abstracted from particular facts; and that opinion, and inferences, and conjectural observations, cannot be subjects of that kind of proof which appertains to facts, before a court of law.

Again: It is no less obvious that the intent to defame, or bring into contempt, or disrepute, or hatred—which is made a condition of the offense created by the act—cannot prevent its pernicious influence on the freedom of the press. For, omitting the inquiry, how far the malice of the intent is an inference of the law from the mere publication, it is manifestly impossible to punish the intent to bring those who administer the government into disrepute or contempt, without striking at the right of freely discussing public characters and measures; because those who engage in such discussions must expect and intend to excite these unfavorable sentiments, so far as they may be thought to be deserved. To prohibit the intent to excite those unfavorable sentiments against those who administer the government, is equivalent to a prohibition of the actual excitement of them; and to prohibit the actual excitement of them is equivalent to a prohibition of discussions having that tendency and effect; Which, again, is equivalent to a protection of those who administer the government, if they should at any time deserve the contempt or

hatred of the people, against being exposed to it, by free animadversions on their character and conduct. Nor can there be a doubt, if those in public trust be shielded by penal laws from such strictures of the press as may expose them to contempt, or disrepute, or hatred, where they may deserve it, that, in exact proportion as they may deserve to be exposed, will be the certainty and criminality of the intent to expose them, and the vigilance of prosecuting and punishing it; nor a doubt that a government thus intrenched in penal statutes against the just and natural effects of a culpable administration, will easily evade the responsibility which is essential to a faithful discharge of its duty.

Let it be recollected, lastly, that the right of electing the members of the government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively. It has been seen that a number of important elections will take place while the act is in force, although it should not be continued beyond the term to which it is limited. Should there happen, then, as is extremely probable in relation to some one or other of the branches of the government, to be competition between those who are, and those who are not members of the government, what will be the situation of the competitors? Not

equal; because the characters of the former will be covered by the Sedition Act from animadversion exposing them to disrepute among the people, whilst the latter may be exposed to the contempt and hatred of the people without a violation of the act. What will be the situation of the people? Not free; because they will be compelled to make their election between competitors whose pretensions they are not permitted by the act equally to examine, to discuss, and to ascertain. And from both these situations will not those in power derive an undue advantage for continuing themselves in it; which, by impairing the right of election, endangers the blessings of the government founded on it?

It is with justice, therefore, that the General Assembly have affirmed, in the resolution, as well that the right of freely examining public characters and measures, and of communication thereon, IS THE ONLY EFFECTUAL GUARDIAN OF EVERY OTHER RIGHT, AS THAT THIS PARTICULAR RIGHT IS LEVELLED AT BY THE POWER EXERCISED IN THE SEDITION ACT." 4th Elliott's Debates on the Federal Constitution, pp. 574-5-6.

The Court and people are again urged to read this masterful paper by the "Father of the Constitution." It was never answered, as results show. It cannot be answered now, except by suppression, and it completely demolishes every contention for the legality of the Espionage Bill.

So, under the Sedition Act and the new Espionage Bill which has since been passed, and is an exact

copy with severer clauses and penalties, what opportunity is there for discussion of either candidates or measures?

Is such a Government as this founded on the "consent of the governed" when the people on whom it rests can only assent to what is done, but cannot dissent from any measures however unwise, destructive or unconstitutional?

(1) The right of assembly, as the Supreme Court has repeatedly held, existed before and above Constitutions, and the right was only guaranteed to be protected by both Federal and State Constitutions, but the right of assembly has now been taken away from the American people. If they dare assemble they are dispersed by Federal officers and their spies. Governors and other officers sworn to support the Constitution, and protect their rights, and who are guilty themselves of conspiracy, as has been decided, are breaking up these meetings. They now disperse the people when they assemble. *Mobs and lawless men catching inspiration from these examples join therein.*

(2) Free discussions in the press is denied and thus papers that attempt to discuss these matters are excluded from the mails, and if they are poor and humble, are prosecuted as criminals in the Courts. The great dailies have been subsidized.

(3) Even letters entrusted to the mail are opened, though to do so violates three clear clauses of the Constitution as has been solemnly decided

by that pure and transcendently great Judge, Mr. Justice Fields, to be illegal.

These and other means have taken away all control of the people of their affairs. They may endorse what has been done, but cannot condemn. This is the extent of the freedom of speech and press. Its terms and manner of enforcement, has struck terror into people and affects jurors.

The power has passed into the hands of one man. And by this and other measures the American people have been completely excluded from their own government. So wrote Mr. Wilson in his New Freedom in 1912. It is far worse now.

LAWS "NECESSARY AND PROPER" TO CARRY OUT EXPRESS POWERS.

ALL CONTROL OVER SPEECH AND PRESS IS BY THE
POLICE POWER; ALL POLICE POWER IS IN THE STATES,
NONE IN THE UNITED STATES.

This subject has been before discussed. I now wish to present it from a different standpoint, both because of its importance and the general confusion which prevails upon the subject.

In the United States the powers of government are divided. Part are delegated to the general government. They are specifically named. The great mass of powers are reserved to the states severally. As to these last the State stands precisely as

do foreign nations, one to the other. These two classes of powers we may suppose to reside in two separate and distinct receptacles. There is no power whatever in the State Governments to put their hands into the Federal receptacle and take out any of these powers. There is no power whatever on the other hand in the Federal Government to reach into the state depository and take out any additional power.

“The General Government and that of the States, although both exist within the same territorial limits, *are separate and distinct* sovereignties, acting separately and *independently* of each other within their respective spheres. The former *in its sphere supreme*; but the State within the limits of their powers not granted, or in the language of the Tenth Amendment ‘reserved,’ *are independent of the General Government, as that Government within its sphere is independent of the States.*” Justice Field, *Collector v. Day*, 11 Wallace 113, page 124. Continuing the Court says:

“The Constitution guarantees to the State a republican form of government—such being the separate and independent condition of the States, in our complex system, as recognized by the Constitution, and the existence of which is so indispensable, that, without them, the *General Government itself would disappear from the family of nations.*” (Page 125).

“The government of the United States and the government of the State are distinct and *independent of each other*, within their respect-

ive spheres of action, although existing and acting within the same territorial limits. Neither government can intrude within the jurisdiction, *or authorize any interference therein* by its judicial officers. There are within the territorial limits of each State *two governments*, restricted in their spheres of action, *but independent of each other, and supreme within their respective spheres. Each has its separate departments, each its distinct laws, and each has its own tribunals for their enforcement.*"

The *Tarble case*, Justice Field, 13 Wallace, page 467.

"*The existence of the States themselves are necessary to the existence of the United States.*"

Supreme Court (1868), *Lane County v. Oregon*, 7 Wallace, p. 76.

"But perpetuity and indissolubility of the Union by no means implies the loss of the distinct and individual existence, or the rights of self-government by the States." Same case.

"And we have already had occasion to remark at this term the people of each State compose a State, having its own government and endowed with all the functions essential to separate and independent existence and that '*without the States in Union there could be no such political body as the United States.*' Not only, therefore, can there be no *loss of separate and independent autonomy of the States*, through this union under the Constitution, but it may not be unreasonably said that the *preservation of the States* and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of

the Union and the maintenance of the National Government. The Constitution, in all its provisions, *looks to an indestructible Union composed of indestructible States.*"

Chief Justice Chase, *Texas v. White*, 7 Wallace 725 (decided in 1868).

And how can the States, necessary to the United States themselves exist, if by laws alleged to be "necessary and proper" to the execution of the express powers, all their *Reserved Powers* may be taken by the United States and the States stripped of all powers?

If the Constitution stopped here, there might arise doubt as to how the Federal Government was to carry out its powers—what would be the limit? But the Constitution says, Congress "may pass all laws necessary and proper to carry out the foregoing powers" etc. *There could not be possible a greater error than to suppose by this clause the general government may assume new powers by trespassing upon those of the States.* It simply means powers which are related to or incident to those named. To illustrate, Congress may raise an army and declare war. It is necessary to arm and equip the army. Congress may do so by buying arms and munitions, clothing, commissary stores, everything needed to equip the army. This both is "necessary and proper" to raising an army and carrying on war. But even then the States would have a right to prevent the powder from being deposited in cer-

tain places, or in a manner to endanger the life of the people.

In no case, by these incidental powers, can Congress *take any of the powers reserved, by the Constitution to the States*. If the General Government, under the pretext of executing its powers, may take from the State powers, it *may take all reserved* by the Constitution. On the other hand, if the States can take from the General Government, any powers vested by the Constitution, then they may take all such powers. By this simple method, either of *addition* or *subtraction* the whole Constitution is destroyed. Neither method is therefore lawful.

UNCONSTITUTIONALITY DEMONSTRATED.

The powers *reserved* to the several States arise, *first*, because *not delegated* or parted with by them; *second*, they are *expressly reserved* by the Constitution to the States. This Constitution, in all of its provisions, *those granting power and those reserving it, is the Supreme Law*. There is no claim whatever of any *express power giving* to the United States control over Speech and Press; next this exercise of power by the States *is not prohibited* to them by the Constitution. It then results, that *all power over the subject is reserved* to the several States.

How then, can a mere Act of Congress, which must be in pursuance of the Constitution, under the

general clause *take from the States any power the Constitution reserves to them*. This consideration alone should forever silence the claim that power over Speech and Press is "*necessary and proper*," to carry out the power *to declare War and raise Armies*.

High authority goes even so far as insist, I think absolutely rightly, that even an Amendment cannot take from any of the States any of their reserved rights. For the State having expressly reserved some rights, those rights are reserved forever. Says Curtis (Constitutional History, Vol. 2, p. 160, an authority in favor of a strong central government): "The Power of Amending the Constitution was intended to apply to amendments which would modify the mode of carrying into effect the original provisions and powers of the Constitution, but not to enable three-fourths of the states *to grasp new power at the expense of any unwilling State*." This is undoubtedly a correct view of the question. But it is undeniably true that under a power to pass laws "*necessary and proper*" to carry out express powers the rights of the States cannot be invaded. This is true on principle, and on authority as we shall now see.

1. No law is "*necessary and proper*" to carry out an express power which violates any other clause of the Constitution, whether that be a clause *vesting* power in the General Government or expressly *reserving it* to the States. All clauses are

equal, all are supreme, and no clause can repeal another.

2. "A state has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limit as any foreign nation where that jurisdiction is not surrendered or restrained by the Constitution of the United States.

All those powers which relate to merely municipal legislation or which may more properly be called internal police, are not surrendered, or restrained; and consequently, in relation to these the authority of the State is complete, unqualified and exclusive."
N. Y. v. Miln, 11 Peters 202.

The first case *N. Y. v. Miln*, 11 Peters 202, is the *Polar Star* in judicial decisions on this question.

New York passed an act requiring the masters of all vessels to report a list of passengers so many hours after arrival. This was a suit for the penalty for failure. It was claimed the law was repugnant to the commerce clause. This is first examined at length and with great clearness, and decided adversely to the contention. Having disposed of this branch the court proceeds:

"But we do not place our opinion on this ground. We chose rather to plant ourselves on what we considered impregnable positions. They are these: That a State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limit as foreign nations,

wherever that jurisdiction is not surrendered or restrained by the Constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a State to advance the safety, happiness and prosperity of its people, and to provide for its general welfare by any and every act of legislation which may be conducive to these ends where the power over the particular subject or the matter of its exercise, is not surrendered or restrained in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police are not thus surrendered or restrained; and that, consequently, in relation to these the authority of a State is complete, unqualified and exclusive." (p. 139).

We ask that this great and leading case be carefully read and applied, in the light to this inquiry: Where in the Constitution have the States surrendered control over press and speech? No one questions the proposition, that Parliament, before the separation, had control over speech and press in England; no one questions that this power possessed by Parliament passed to and vested in the several States, as a part of that great mass of power known as "the police power?" Where in the Constitution was this power *delegated to the United States, or prohibited to the States?* If this cannot be shown, then its attempted exercise is by and through usurpation. And that is all there is to this question.

The dissenting opinion of Justice Story is equally strong on this point; but he thought the particular Statute violated the Commerce clause.

Therefore to sustain the Espionage Act the government must sustain one of the following propositions:

First: That regulation of speech and press is not a police power, and hence not reserved to the States.

No one will contend that this is the case.

Second: Or, being a police power, and so reserved to the States by the Constitution, *it may be taken from them* in the execution of an express power.

To maintain the last, the entire Constitution as it plainly appears upon its face, must be overthrown and all of the decisions of the courts reversed. For nothing is plainer than the latter have uniformly held that all police powers belong to the State and *cannot be taken from them by Congress in any manner.*

In the case first cited *New York v. Miln*, it is said that the police regulation of New York, intended to promote the health and quiet of the people of that State was valid, though it tied up every vessel by refusal to comply with it, engaged in either commerce between the States or with foreign nations.

No extended review of cases will be made—the

principle is well established. For instance in *Brown v. Maryland*, 12th Wheaton on p. 443, Ch. Justice Marshall, says: "The power to direct removal of gunpowder is a branch of the police power which unquestionably remains, and ought to remain, with the State." Now Congress in raising an army cannot in any State, disregard the State Police Law as to where gunpowder may be stored.

The United States may levy an excise tax. It is unquestionably often a necessary power to be exercised by the United States in order to raise revenue. But every State can prohibit the sale of intoxicating liquors, and the United States cannot legally authorize any man to sell liquor. The power to issue a license by paying the excise tax, is subject to the police power of the State, to prevent all sales of liquor.

Pervear v. Mass., 5 Wallace 475;
Miller v. Ammon, 145 U. S. 421;
 and other cases.

Again it is held that though the United States may grant a patent, the State may require a license, or even may prohibit its sale.

So it has in like manner been held that a mail carrier, while actually carrying the mail, may be arrested on a charge of murder or other felony, by the State authorities. Although such arrest will, for the time being, interrupt the mail.

In fact nothing is clearer than no power is possessed by the general government, *can be exercised*

to destroy the valid police regulations of a State.
 HENCE IT FOLLOWS THAT IN CARRYING OUT THE POWERS WHICH ARE GIVEN TO THE UNITED STATES, NO LAW IS "NECESSARY AND PROPER" OR MORE PROPERLY EITHER "NECESSARY" OR "PROPER" WHICH INFRINGES THESE RESERVED POWERS OF THE STATES.

But there is, if possible, stronger demonstration. It is found in the 14th Amendment. This declares:

"Nor shall any State deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the law."

Now we have here in an Amendment in words too plain to be mistaken, *that the protection "of life, liberty and property"* resides in the States under their police power; and they are only prevented in the exercise of this police power of depriving any person of any of these great rights without "due process of law or the equal protection of the law."

Here is an express admission that control over Speech and Press was in the States.

Fortunate indeed it is, as said elsewhere, when great questions can be decided by historical facts. Almost as fortunate when they can be demonstrated to be true.

DEMONSTRATION.

1: *In England Parliament had control over speech and press.*

2: *On the Revolution of the several States succeeded to the powers of Parliament. This has been shown historically and by authorities.*

3: *These States met in convention and framed the Constitution, naming the powers given to the general government. There is no claim by anyone that they expressly delegated any power that they then possessed over speech and press to the United States.*

4: *It is not claimed that the Constitution denied the exercise of any power over speech and press to the several States. In fact it has been expressly held that the first ten amendments, including the first, relating to religion, speech and press, are a limitation upon the general government.*

5: *All control over speech and press therefore remained with the States, and so remained also by an express clause of the Constitution. Amendment X.*

6: *So remaining in the several States, in the exercise of an express power, no power exists to assume any of the powers reserved to the States.*

7: *For greater security an Amendment declares "Congress shall make no law * * * abridging the freedom of speech or of the press."*

8: *Now does the act of June 15th, 1917, known as the Espionage Act, violate this clause?*

ANSWER. *Defendant is indicted, as have been many others, under this Act for speaking and writing certain articles. If the Act had not been passed he and they would have been free to both speak and write.*

Grotious says: "God cannot change a law of nature. For instance he cannot make two and two anything but four." Without admitting that God who made the law of nature cannot change it when the syllogisms, or deductions above, can be controverted by any living man, then he can do what Grotious says God cannot do—he can show that two and two are five.

Now let the Administration, and let the courts who are enforcing this Espionage Bill, show that any of the above propositions are untrue; or let them manfully say they have been exercising unconstitutional power.

HISTORICAL VIEW OF THE ORIGIN OF SEDITION AND ESPIONAGE BILLS.

I now come to a branch of this question of controlling influence. *To form any exact opinion as to the power of Congress over Speech and Press, and therefore as to the validity of Espionage Bills, punishable as sedition as libels upon the Government, strict attention must be paid to the following:*

1st: *To the origin and basis of this doctrine in England;*

2nd: *To the fundamental difference in character between the Constitution and Government of England, and that of the United States;*

3d: *When this is done, we shall then clearly see that the reasons given for this Doctrine, in England, never had any place in our form of Government. In fact, we shall see that these arose directly out of the principles of government, where sovereignty resided in the government—the very doctrine driven out by the war of the Revolution and our Constitution; and now for the first time (except the brief Sedition law), on demand of a President, sought to be enthroned again.*

CONTEMPTS OF GOVERNMENT BY WORDS CALLED, SEDITION; ITS ORIGIN AND FOUNDATION.

FIRST: *Contempts, afterwards called Sedition, as a crime against Government had no existence at common law. (That Sedition by overt acts existed as a crime at common law is not germane to the subject. Nor that it existed as contempt of courts and parliament punished summarily.*

SECOND: *Sedition as a crime, by words, first originated in the statute of Scandalum Magnatum (great scandals), where it laid dormant for one hundred years, during which time there existed no*

case in any court of law. It then was put in practice in the Star Chamber.

THIRD: *On the abolition of the Star Chamber in 16 Charles I, "to the general joy of the whole nation" (4th Blackstone, p. 267), ex-officio informations for Sedition by words ceased to exist, except in so far as they were transferred by the act abolishing the Star Chamber, to courts of law.*

FOURTH: *"Into this court of Kings Bench hath reverted all that was good and salutary of the jurisdiction of the Star Chamber" (4th Blackstone, Chap. 19, p. 268). That is some of the arbitrary laws, originated by the Star Chamber, making libels on the King and Parliament Sedition, were declared offenses to be punished in the Kings Bench.*

FIFTH: *That this practice of the Star Chamber, and the after acts of Parliament, making words against the Government Sedition, proceeded on the sole idea of the English Constitution that sovereignty resided in Parliament and "the Kings Government can do no wrong."*

If time permitted it could be shown these propositions are sustained by English law and precedent. If this is their origin then all "Espionage Bills" fall in the United States; with the principles of Government on which they were founded being excluded, and the "consent of the governed" being made the basis of the American systems. For the sovereignty of government and infalibility of rulers does not exist in the United States. On the con-

trary, "In the United States sovereignty resides in the people, the government has no sovereignty but only delegated powers from the people; that so far from being infallible and incapable of doing wrong our whole system of government, State and Federal, is founded on the very reverse theory—that officers may do wrong, and will do wrong, if not restrained by written constitutions; *and to make these restraints effectual the people must be left free to discuss their officers and agents.*" Hence libel on government, as Sedition, is unknown by our Constitution and cannot exist, except through the destruction of the Constitution and all the principles of liberty it secures.

It would clarify this question to present in full the incontestable evidence that the above propositions are true. This would demonstrate that the power attempted to be exercised by the Espionage Bill exists, and is founded upon the distinct doctrine in England, *that Sovereignty resides in Parliament*, and that the King is the head of Parliament and that he can do no wrong. Espionage Bills, called there Sedition, as offenses against Government, are logical in a Government so constructed, *but they are repugnant and impossible in a Republic.* Mr. Jefferson said, quoted elsewhere, that the parties of *Whig* and *Tory* existed everywhere by nature. These laws are founded upon the Tory theory of Government, and are in harmony with that perverted theory. Our Government is founded on the Whig theory (Prof. Wilson admits this). And

these laws as founded upon the Tory theory, were expelled.

But both space and time forbid any extended exposition of the above principles. In lieu of this I refer the Court and people to the brief of Mr. Storrs on the trial of Judge Peck in the Senate of the United States. Official Report (page 372). This is probably the most complete and exhaustive Brief upon this subject ever filed. I have never discovered but one immaterial error in it. I cite however a passage from the great and immortal case of *Entick v. Carrington*, 19 State trials, P. 1030. Every lover of his country should read this great case by Lord Camden, the noblest judge and patriot in the history of England—then Chief Justice Pratt. I ask the reader to turn to his biography and read the just tribute of Lord Campbell in the Lives of the Lord Chancellors. He says, at length, that Camden established the liberty of the Press; abolished General Search warrants; (Under this Espionage Bill they don't need search warrants to enter houses, as it is enforced); established the right of juries to pass upon the law in libel cases; established firmly the writ of habeas corpus, "and his wisdom would have saved to England her American Colonies." We named towns and counties after him, and accorded him when he died public honors. In England a grateful people erected a monument and put on it this noble and just tribute "Defender of Liberty by Law" and when life's fitful dream is over, may we a ransomed people be able to put on

in like manner, the resting places of those who write the opinion herein—"Defender of Liberty by Law." He said in this case:

"It was very evident, that the Star Chamber, how soon after the invention of printing I know not, took to itself the jurisdiction over public libels, which soon grew to be the peculiar business of that court * * * The Star Chamber from this jurisdiction presently usurped the general superintendence over the press and exercised a legislative power in all matters relating to the subject. They appointed licensors; they prohibited books, they inflicted penalties, and they dignified one of their officers with the name of the Messenger of the Press, and among other things enacted this warrant of search.

After that court was abolished, the press became free, but enjoyed its liberty not above two or three years; for the Long Parliament thought fit to restrain it again by ordinance. Whilst the Press is free I am afraid it will always be licentious and all Governments have aversions to libels. This Parliament therefore did, by ordinance, restore the Star Chamber's practice. It was against this ordinance that Milton wrote that famous pamphlet called *Areopagitica*."

The American reader can here see the origin of the doctrine of libels upon Government called in England Contempt and Sedition. They can here see the origin and only basis of Espionage Acts in the United States. For they originated in the prac-

tice of the arbitrary Star Chamber; they were expelled by the principles of the Revolution and the Constitution and are now sought to be revived by readopting the principles of the Star Chamber over the prostrated form of the Constitution. I challenge the administration; I challenge Congress; I challenge any court—some of whom are enforcing it with the same methods that once prevailed in the Star Chamber—to produce any other precedent.

FORM OF THE CONSTITUTION.

Mr. Madison in his celebrated Report states this fundamental difference between the English Government making such laws possible, and that of the United States, which excludes all such laws.

ESSENTIAL DIFFERENCE BETWEEN BRITISH GOVERNMENT AND AMERICAN CONSTITUTION.

“The essential difference between the British Government and the American Constitutions will place this subject in the clearest light.

In the British Government, the danger of encroachments on the rights of the people is understood to be confined to the executive magistrate. The Representatives of the people in the Legislature are not only exempt themselves from distrust, but are considered as sufficient guardians of the rights of their constituents against the danger from the Executive. Hence it is a principle, that the Parliament is unlimited in its power; or, in

their own language, is omnipotent. Hence, too, all the ramparts for protecting the rights of the people,—such as their Magna Charta, their bill of rights, etc.,—are not reared against the Parliament, but against executive usurpation. Under such a Government as this, an exemption of the press from previous restraint by licensers appointed by the King, is all the freedom that can be secured to it.

In the United States, the case is altogether different. The people, not the Government, possess the absolute sovereignty. The Legislature, no less than the Executive, is under limitations of power. Encroachments are regarded as possible from the one as well as from the other. Hence, in the United States, the great and essential rights of the people are secured, not by laws paramount to prerogative, but by Constitution paramount to laws. This Security of the freedom of the press requires that it should be exempt, not only from previous restraint of the Executive, as in Great Britain, but from legislative restraint also; and this exemption, to be effectual, must be an exemption, not only from the previous inspection of licensers, but from the subsequent penalty of laws."

In the course of time the people have forgotten—and even our Courts seem not always to remember—the true import of the Declaration of Independence. They have come to regard it simply as a physical severance. It was this, *but far more*. It announced *an entire change* in the theory of Government. Not new it is true, but based upon the

law of God "that all men are created equally," that is in legal rights; and, that all "just powers arose from the consent of the Governed." Through preversion, it was once believed that Governments were of Divine origin; and that Kings, however debased, ruled by Divine right. This fallacy was afterwards exploded, and a new theory, equally erroneous substituted, namely: That the people, through a social compact founded the State, or body-politic (Which is true), and then, *by a second Social Compact* the people assigned their Sovereignty, and right of self government to a certain person, and his heirs, in consideration of their protection. This fallacy of the second Social Compact and the basis of monarchy is set forth by Grocius, Puffendorf, Berlamquei and others of that class, and it is virtually but not in words, announced by Judge Story in his work. But the American Colonies, in the great Declaration, and with that clearness, conspicuous in all Mr. Jefferson's writings, set forth the true theory—that men *were created equal in legal rights*; that Governments are founded *upon their consent*; that its objects are to secure the natural rights of man; that the people are to Sovereigns and Rulers *but their agents*.

This is *the basis of our whole political systems*, and the question in this case is: Shall it perish or be preserved? What matters it, that precedent for such laws, can be found in Governments different in construction. If not such logic, *or the lack of it*, Tory principles can now be substituted for those

of the Whig. If they can, then every particle of our Government may be destroyed by the theory. And as said by Franklin, all men have a natural tendency towards monarchy, the greatest difficulty, in maintaining free Government, has ever been *to prevent the gradual substitution of the principles of monarchy* for those of freedom, or the sovereignty of rules for the sovereignty of people.

This bill, if it stands, effectually brings about that revolution.

Let it be said, as directly bearing upon this subject, that if we consult English law books, we find much space devoted to "Libels Against Governments." And Seditious against Government, by words." For instance, in the celebrated work "Hawkins, Pleas of the Crown" Book One, Chapter 21 to 24 inclusive, divides these offenses, under different heads. "Contempts Against the King's Prerogatives." "Contempts Against His Person." "Contempts Against His Government, Title, Courts."

This division is substantially that of the leading English work, Odgers on Libel and Slander. He has a heading "SEDITIONOUS WORDS." This he divides into "I, Treasonable Words; II, Defamatory of the Sovereign Himself;" "Words Defamatory of the Kings, Ministers and Government." Odgers, Chapter XVI, p. 409.

He says, "It is a misdemeanor punished by indictment or information, to libel, or slander *the*

Sovereign, or his ministers, or the Constitution of the realm, Parliament or its Members." Odgers, P. 412. He cites among other authorities, the Statute 60, George III. We have copied this Statute, *though gone beyond it*, and made it a felony, and imprisonment may be ten years and a fine of \$10,000.00. In a word we expel George the Third, but adopted, in a more extreme form, his laws.

On the other hand, we have many American works on Libel and Slander—on persons and even title to land. But in none of these, *are there any Chapters on Libel, Slander, Sedition*, as in England, on Government. They treat of all kinds of crimes, but none of Sedition by words, bringing governments and officers into contempt.

On the contrary it is both the right and duty of every citizen to bring their officers into contempt in so far as showing they acted unwisely or illegally may bring them into contempt. But on the contrary the Espionage Bill prevents this and hedges rulers about with infallibility.

Why is this difference in the law books. An intelligent answer to this question absolutely disposes of every claim for the validity of the Espionage Law. The answer is *that no such crime is known to American jurisprudence and cannot exist in America*. Let this be further explained. In England it is *treason*, to encompass the King's death, or to debauch his wife or daughter. This theory is founded upon the theory of the English Constitu-

tion—to kill the King is to kill the Government; and to debauch either his wife or daughter is to render uncertain the succession. But in the United States, these crimes are not treason—not only not so by the Constitution, but as repugnant to our theory of Government. These crimes are punished in a different way. *It is precisely so of Libel and Slander as Sedition or Espionage on Government.* The several State Governments, unlike that of the United States, have all powers where not restrained. Yet Judge Cooley expresses a doubt as to the power, even of the State, to make Libel and Slander of the Government, a distinctive crime. (Cooley's Constitution Limitations Chapter 12, P. 427; P. 531, Star 430.) It must be said, however, that Judge Cooley falls into an error, in supposing this was ever a common law offense in England. Contempts of Courts and Parliament, punished summarily as such, existed by the common law. But contempts by words against Government, arose, as heretofore pointed out, by the Statute of *Scandalum Magnatum*, or Great Scandals, and lay dormant for one hundred years. They were then taken up in the Star Chamber.

“Its jurisdiction extended to all sorts of offenses, contempts and disorders that lay not within reach of the Common Law. There needed but this one court in any Government to put an end to all regular, legal, and exact plans of liberty; for who durst set himself in opposition to the crown or ministry, or to aspire to the character of a patron

of freedom while exposed to so arbitrary a jurisdiction? I much question whether any of the absolute monarchies of Europe contain at present so illegal and despotic a tribunal." Hume's History of England, Vol. 4, Page 346.

This very effect has been brought about in the United States. Men, and even women, talk in whispers, or behind doors, or do not talk at all on public affairs.

It was in the practice of this despotic tribunal, said by even the Tory historian Hume, to be hostile to all liberty, that the power now claimed by Congress to pass Espionage Bills in the United States, originated and was perfected by this arbitrary tribunal. *In a word, these Espionage Bills find their true and only origin and precedent in the practice of the Star Chamber.*

We know that the principal business of this Court was to punish offenses *which had no existence in the law*, either by Statute or the Common Law. The Court principally made its own law. In fact, as administered, our Courts partake very much of the same character. Each Judge seems to try to outrival the others; and *each seems to be a law unto himself.*

THE RESULT, IF LIBELS ON GOVERNMENT ORIGINATED
AS ABOVE.

It then follows that if this class of crime sprung out of the peculiar organization of the British Gov-

ernment, excluded by ours, it can have no place in our jurisprudence. For in excluding the principles, we excluded laws growing out of these excluded principles. *And that they did so originate is beyond question.*

I urge upon Courts, and others, to carefully read the arguments upon both sides in the trial of Judge Peck before the Senate in 1830-31. It is probable that no such array of distinguished counsel, ever appeared in any Court in America. As said the Brief of Mr. Storrs is complete. Mr. Buchanan has been greatly slandered, owing to his peculiar situation at the commencement of our Civil War. It is doubtful if we ever had a President, his equal as a lawyer, unless Mr. Jefferson and Madison as Constitutional lawyers and perhaps Pierce as an advocate. His speech in the Senate, as the leading manager, is an argument of the first character. The speech of Mr. Wirt, occupying two days, *was the greatest ever made by an American lawyer*, and should be read by this Court, and by every lawyer of the present day. When pressed he admitted that there was no power in Judge Peck, or any Court, to punish as contempt, newspaper articles. Judge Peck was old; almost blind, and had to be lead into the Chamber. Mr. Wirt laid down the leading proposition that no Judge could be impeached for error of judgment, but that it required a criminal intent. And that in the case there was no criminal intent, *as Judge Peck had acted in ignorance of the law.*

It was this presentation that acquitted the Judge, by a narrow margin.

At an early day the House in Pennsylvania, had impeached Chief Justice Shippen, and his associates, for punishing as contempt, the publication of a newspaper article. He was a Judge of profound learning, and most estimable character. Yet eleven Senators voted him guilty and thirteen not guilty—a change of two would have convicted him, a majority only being required. Soon afterwards in 1809, the legislature enacted a law confining contempt to acts in presence of the Court, or so near as to interrupt its proceeding. After the Peck trial, Congress enacted the same law as to the Federal Courts. Had these Historical Facts and this trial been brought to the attention of this Honorable Court, it is not possible, that it could have rendered the recent opinion in the Toledo contempt case. For in that case, the Court sanctioned such proceedings, notwithstanding the provisions of the Statute, although Judge Peck, *before the Statute*, was acquitted solely because he exercised a power ignorantly, that the Court sanctions in the Toledo case. And in the opinion the Court—it may be an error of the printer—says that the trial of Judge Peck, influenced the Pennsylvania Legislature to pass its law in 1809. This could not be of course, as the Peck trial did not occur until twenty-one years after the Pennsylvania Statute was enacted.

This is all material as showing how repugnant

have heretofore been the Courts, and the people, to uphold any attempt in the United States to control Speech and Press.

OBJECTS OF THE WAR.

As this Espionage Bill has been enacted, in furtherance of the prosecution of the War, it is claimed it is necessary—in fact indispensable—in determining its legality to consider the occasion which has called it into existence. *And yet this is to venture on delicate ground.* Its importance is evident. However, there has been so much misrepresentation—so much suppression of truth, so persistent putting forth of falsehood; such appeals to passion, that it is impossible to present the real facts, without arousing those passions, which make the investigation of the truth impossible. Therefore, this, and other cases, involving a like question should have rested.

For their investigation involves a question which it is not now possible to dispassionately consider. But it must be done.

FOR WHAT CAUSE WAS WAR DECLARED.

The resolution declaring it did not state. This it should have done. It has always been customary; it is always required by International Law to be done. The object in requiring it is plain; namely, that the adverse nation without War *may concede*

all that is demanded without War. No reasons of State can excuse such an omission.

“They have not, it is true, taken into their own hands the hatchet and the knife, devoted to indiscriminate massacre, but they have let loose the savage, armed with these cruel instruments; have allured them into their service, and carried them to battle by their sides, eager to glut their savage thirst with the blood of the vanquished, and to finish the work of torture and death on maimed and defenceless captives. And what was never before seen British commanders have extorted victory over the unconquerable valor of our troops, by presenting to the sympathy of their chief, captives awaiting massacre from their savage associates. And now we find them, in further contempt of the honorable modes of warfare, supplying the place of a conquering force by attempts to disorganize our political society, to dismember our confederated republic.” Madison’s message to Congress March 4th, 1813. *Statesman Manual* 307.

“The systematic perseverance of the enemy in courting the aid of the savages in all quarters, had the natural effect of kindling their ordinary propensity to war into a passion which, even among those best disposed toward the United States, was ready, if not employed, on our side, to be turned against us. * * * * And who have not controlled them either from their usual practice of indiscriminate massacre on defenceless inhabitants, or from scenes of carnage without a parallel, on prisoners to the British arms, guarded by all the laws of human-

A CORRECTION.

The matter commencing on page 174, with the words, "They have not, it is true," and ending on page 175, with words "Statesman's Manual, Vol. I, page 315" was inserted through in error in setting up the wrong passage. It has no relation whatever with the context, or perhaps with the brief. But, if desired, may be read at the end of the excluded part of "Declaration of Independence," Page 198, after the words, "Wish to continue the Slave Trade." The passages which go in here are as follows:

"Anxious to abridge the evils to which a state of War cannot be exempt, I lost no time after it was declared *in conveying to the British Government the terms on which its progress might be arrested.*"

(Madison Messages, Nov. 4, 1812, 1 Statesman Manual, P. 300.)

"The law of nature only admits of it, (War) in the last extremity. * * * We should first declare to the unjust nation, or its Chief that we are going to have recourse to the last extremity. * * * A Declaration of War being necessary * * * it should set forth *the reasons, which have induced us to take up arms.* This is at present the constant practice of the powers of Europe." (Vattel Book 3, Chap. IV, Sec. 315.)

"It is necessary for the declaration of War be known to the State against which it is made." He then sets out how this notice is conveyed. (Sec. 316.)



ity and of honorable war. For these enormities the enemy are equally responsible, whether with the power to prevent them they want the will, or with the knowledge of a want of power they still avail themselves of such instruments." Madison's message Dec. 7, 1813, Statesman Manual, Vol. 1, p. 315.

HE KEPT US OUT OF WAR.

This was the claim made for Mr. Wilson, and for Democratic candidates for Congress in the election in 1916. *He was elected unquestionably* because the people were made to believe that he in fact had kept us out of War. A former member of this Court was defeated because he was unknown on this question. Undoubtedly the people wanted peace—not War. Yet at that time all the wrongs afterwards complained of against Germany had taken place, except as was claimed the interception of a letter, indicating that Germany in the event of War sought to engage Mexico on her side. The Lusitania had been sunk. Over one hundred American citizens had been drowned. So had other vessels.

This was such a diabolical act, *if not justified by the rules of War*, that required the United States to demand at once, *and without any evasion*, full reparation and indemnity, if that was possible. The matter should have been submitted to Congress, and that body should have determined the two questions. First, whether it was a violation of the rules of War, *and an invasion of our rights*, and secondly, if so,

whether we should declare War against Germany. Then if not, Congress should have fixed responsibility, for giving clearance to the vessel carrying contraband of War, and then issuing passports to American citizens to travel upon this vessel, *which was clearly an auxiliary, or a part of the Army of Great Britain.*

This was not done. The administration went on giving protection, as far as it could, to this illegal trade, issuing clearance to vessels carrying contraband, and issuing clearance or permission to sail to belligerent vessels, and issuing passports to our citizens to travel on them. *The shipments continued; the passports continued; the sinking continued; the correspondence continued,* and out of all this finally came War. *Why was this course pursued?* It was a new department. The answer is, that under the *clear principles of International Law the rights of an American citizen, beneath a British Flag, and on a British Ship are precisely the same—and no more as in a besieged city, or on the ramparts of a hostile fort.* This is laid down by all the authorities, and the course of the administration shows that it knew this to be the law. That it is the law will be shown. This is the only possible explanation why the facts were not submitted to Congress, as a basis for the declaration of War. The President went before the country on the claim that he kept us out of War, and in his Campaign book put forth by his authority, he said that all controversy

with Germany was at an end. He gave her a receipt in full.

He was elected, and almost immediately demanded a declaration of War *though no new conditions had arisen.*

He then immediately demanded two measures.

First: A Conscription Law, *which put the entire State Governments and their officers, under his command and that of the Provost Marshal.* It made them criminal for failure to carry out the orders of the President, *and the Provost Marshal.* It is not the purpose to discuss the constitutionality of that law here. It was not discussed before the Court in a former case as the Court states. But some remarks are made as bearing on the main question.

The sole power to raise powers *is vested in Congress.* This implies the number, organization and means to be employed. This bill did not provide *for raising an Army.* It provided that the President might have that power. Among other things it provided:

First. "Be it enacted * * * * the President be, and he is hereby authorized:

First: Immediately to raise, organize and officer and equip *all, or such number* of the increments of the regular army, provided by the Defense Act approved June 3d, 1916, *or such parts thereof as he may deem necessary.*" Section 1.

Here the bill vested the powers in the President *that the Constitution vested in Congress.* Kings

once raised armies, and thereby involved their countries in constant war. The makers of the Constitution reversed this policy; the bill restores it.

Second: "The President is authorized *to increase or decrease* the number of the *organizations prescribed* for the typical brigades." Section 1.

By the above he is given power both to increase and decrease the number of organizations provided for elsewhere. Thus he is to suspend one law, or exceed it and raise more. *All this power given to the President is legislation vested in Congress, by the Constitution.*

If Conscription is a constitutional mode of raising an Army, it is the exercise of tremendous power, and the power belongs to Congress and not to the President to provide it. It authorizes the seizing of the citizen, his transfer into a soldier, and transportation abroad. This bill transfers the power of providing for Conscription as a means of raising an Army to the President. Congress has never provided for Conscription.

Fourth: "That the enlisted men required to raise * * * * shall be raised by voluntary enlistment, *or if, and whenever, the President decides that they cannot be effectually raised or maintained, then by Selective Draft.*" (Section 2).

This measure, if lawful at all, under the Constitution, rests on the calm judgment of the two Houses—Senators and Representatives. To provide for Conscription is to "raise Armies" if a valid

measure by the Constitutional power. It is a power, if it exists at all, under the Constitution *rests alone in Congress*, and does not, and ought not to rest on the decision of one man. This Army of two millions, or more, has been drafted, *not by an Act of Congress*, but by order of the President. There are many other equally clear objections that might be urged. The above is enough for present purposes. But it may be added, that it is commonly reported this measure was drafted by an Army officer, and urged by the President. There is danger when a military officer writes an Army Bill, and Congress passes it. Beware said Justice Curtis how we borrow arbitrary power—when we put the military above the civil—or when the Army, instead of Congress, draws a Military Bill.

The President then immediately demands the Espionage Bill, and this makes it Sedition and a crime, to discuss all these measures. *Is such a law valid?* That is now the great question.

As out of this War grew the Espionage Bill, now under investigation, an examination of the subject of Neutrality and the Rights of Belligerents becomes necessary. It is to be regretted that it is so. But as the Government has asked that the case be advanced, *a discussion cannot be avoided, however grateful its omission, at present, would be.*

The discussion of this matter *is unavoidable.* First, some of the articles set forth discuss our Foreign relations, before the Declaration of War;

and in view of the fact that discussions of these matters are now claimed "to be licentious" and a violation of the Act, the true rule of Neutrality must be stated.

Let one remark be here impressed; and it covers the whole subject. The course of the President in this matter, as in many others, has been unprecedented. Not only unprecedented, but it is believed to have been unknown to International Law. Furthermore, a different course has heretofore kept us out of all European Wars, and especially the difficulties that confronted Mr. Jefferson as Secretary of State, and as President, in the Wars of Napoleon were far greater than those which Mr. Wilson had to meet. In a word, Jefferson, with consummate ability, which has never been equalled, blazed out a road and established what has ever since been known, and been followed by all civilized nations, except England, as "THE GREAT AMERICAN DOCTRINE." Mr. Wilson, at the very commencement, departed from this beaten track, and immediately upon the declaration of the European War, requested that both belligerents (which was none of our concern how they conducted their War), should conduct the War under "the Rules of London." That would allow the United States to sell munitions, and all contrabands of War, freely and safely transport them, to both belligerents. This was accepted by Germany and rejected by Great Britain though it was a doctrine first advanced by

her. *This was impracticable, impossible, a violation of settled rules and could not have resulted otherwise than involve us in the controversy.*

THEREFORE, REGRETFULLY, WE TURN NOW TO THIS SUBJECT.

THE RIGHTS OF BELLIGERENTS; AND THE DUTIES AND OBLIGATIONS OF NEUTRALS.

First: Belligerents are those Nations who, by regular authority, have declared War against each other. Their *Allies* are those nations which have not made a formal declaration of War, but who by prior treaty supply them with all necessities for the prosecution of the War.

Second: Neutrals are those Nations who are friendly to both parties *and assist neither*, in the prosecution of the War, by furnishing men, munitions, arms or supplies of anything, *directly useful in War*. (Vattel Book III, Chap. 7, Sec. 103).

FIRST: BELLIGERENTS AND THEIR RIGHTS IN WAR.

This is very important to be clearly stated. Important in itself; and important because, in all the discussions of this subject, which preceded this War, the public intelligence has been mislead. The wildest theories have been put forth by subsidized press, *and no true discussion allowed to be made*. This discussion, had it been possible, would have

clarified the political sky. So that the whole public intelligence has been debauched, and passions of the American people aroused.

At the threshold one elementary and guiding principle must be clearly stated and kept constantly in mind by this Court. That is, **THERE ARE TWO SEPARATE AND DISTINCT LAWS OF NATION ON THIS SUBJECT.** Under one law a belligerent can do certain things; under the other *its rights are greatly curtailed.* The first is known **AS THE NATURAL LAW OF NATIONS.** (Vattel Preliminary Sec. 27).

The second is known as the **VOLUNTARY, CONVENTIONAL AND CUSTOMARY LAWS OF NATIONS.** (Vattel Sec. 6 and Sec. 27).

These Vattel denominates the Positive Law of Nations. Grocius, with greater simplicity perhaps, styles the first "the Law of Nature" and the second "the Law of Nations."

Another point must now here be made clear. Each nation, however small, *is the equal in right,* of every other nation. And it is well established that every nation on the declaration of War *may decide for itself, whether the war shall be conducted under the rules of "The Natural or Necessary Law of Nations," or as called by Grocius "The Law of Nature"; or under "The Voluntary, Conventional and Customary Laws of Nations."*

To impress this point it may be stated that in our Civil War, the United States determined to

conduct the War under the first law, and in the Rules formulated (Rule 100, drawn by Prof. Lieber, a German) expressly lays down the rule that everything may lawfully be done in War, except the Four Acts hereafter named. *And the Civil War was so conducted.* On the other hand the Confederate Government resolved to *conduct the War under the Voluntary or Customary Law of Nations.* Under the one Sheridan burnt up the Valley of Virginia. *And, if deemed necessary, was lawful under that law.* On the other hand, General Lee, when he invaded Pennsylvania, acting under the Modified Law, issued a stringent order, which was obeyed, that his soldiers should not invade private premises, and private property should not be disturbed. This was in exact accordance with the Voluntary or Customary Laws of Nations.

WHAT ACTS ARE VALID UNDER THE NATURAL LAW OF NATIONS.

Every act of violence whatever is permitted against the enemy, except first, poison; second, assassination; third, using the enemy's flag, or any act of cruelty "for the sake of suffering or revenge," which does not tend to success directly.

(Vattel Book III, Chap. 8, Sec. 136; Moore's International Law, Vol. 7, p. 178 and this Government compilation cites the before mentioned Rule 100.)

“As soon, therefore, as we have declared war, we have a right to do against the enemy *whatever we find necessary to the attainment to the end*—for the purpose of bringing him to reason, and obtain justice and security from him.” (Vattel *supra*).

“Accordingly, whenever it is certain and evident that such a measure, such an act of hostility, is necessary, in general, for overpowering the enemy’s resistance, and attaining the end of a lawful war—that measure thus viewed in a general light, is, by the law of nations, *deemed lawful in war*, and consistent with propriety, although he who unnecessarily adopts it, when he might attain his end by gentler methods, is not innocent before God and his own conscience.”

(Vattel Book III, Chap. 8, Sec. 137).

The official compilation of International Law, upon the same subject, by the United States upon this point, is the same.

“Military Necessity does not admit of cruelty—that is, the infliction of suffering, *for the sake of suffering or revenge*. It does not admit of the use of poison in any way.”

(Moore’s International Law, Vol. 7, p. 178).

Other authorities could be cited, but are unnecessary, since the Rule *is established beyond question*.

NEXT, WHO DECIDES UNDER WHICH LAW THE WAR SHALL BE CONDUCTED.

It is plain that if it may be conducted under either law, that each nation, being equally sovereign and independent, *must judge for itself*, under which law it will operate. The North in the Civil War, had the legal right to choose either rule of action, however some methods may have been from the moral view criticised. *No other Nations*, either *Belligerent or Neutral*, can prescribe the course. The great and harmful error of the United States, which involved us finally in War, and which it is now proposed to be repeated by *Mr. Wilson's Fourteen Specifications*, is that the United States undertook, *contrary to all precedent in the past*, and *contrary to every dictate of reason and law*, to meddle in the European War and regulate how the warring factions should conduct their contest. Heretofore, we kept out of meddling.

"But as it is very difficult always to form a precise judgment of what the present case requires, and as, moreover, *it belongs to each nation to judge what her own particular situation authorizes her to do.*"

(Vattel Same Book and Chapter, Sec. 137).

The official compilation of International Law by Mr. Moore lays down the same rule. He says, "a belligerent has in a general sense, the right *to use all forms of violence against the person or prop-*

erty of his enemy that may be necessary to bring the latter to terms; so that violence ceases to be permissible *only* when it is shown *to be wanton*, or grossly disproportioned to the end of the attainment.

"It allows *all destruction of property*, of obstruction of the *ways or channels of traffic*, or communication, and the withholding of sustenance or the means of life from the enemy." (Moore's International Law, Vol. 7, page 1789).

Under this law then, and Rule 100 still in force, if a German vessel, after our declaration of war, had gone, say to Spain, loaded with war material, then took on some Spaniard Neutrals, and were about to deliver to the German Army these munitions, to be used against the American Army *could an American U-boat sink the vessel*, if to do so, was to drown the Spaniards aboard? The answer to this clears the atmosphere.

The great Grocius, the Father of modern International Law, also states, that the Customary Law of Nations, which modifying the above, "is only binding upon a Nation so long as it wishes to conform thereto." And the *Administration* in its final action has *recognized the above rule*. For if the United States had the right to give clearance, or a license to sail, to the *Lusitania*, or other belligerent vessels, carrying munitions and other contraband; and if they had the right to issue passports to American citizens, to travel upon such vessels,

then the citizens were under the protection of the American Flag, and it was the bounden duty of this Government to have avenged their death, by every possible means, even if necessary by the declaration of War. But if on the other hand, the vessel was on an unlawful mission, and was in fact an auxiliary to the British Army, and the act, however horrible, was allowable, under the rules of Law, then only could the United States be justified in pursuing the course the Administration did, in forgiving and condoning what would then have been the gravest of offenses.

THE CUSTOMARY, VOLUNTARY OR CONVENTIONAL LAW OF NATIONS.

So drastic and extreme are the rules of the first law, that in modern times, civilized and Christian nations, have sought by certain customs and treaties, to modify its harsh practices and rules. So there has grown up certain customs. The first of these is the great doctrine of *Neutrality*. *It is the most humane rule, and the greatest rule, ever invented by the wisdom of man, and founded upon the principles of Christianity.* In former times all nations were either Belligerents or their Allies. There was no such thing as neutrality; it is of comparative recent origin. What it is in fact will be soon stated.

Under the second Law, vessels *are not sunk*, without taking off those aboard. Cities *are not*

burnt, or bombarded, without notice, and allowing belligerents to escape. General Lee invoked this rule at Fredericksburg, and asked time of a few hours to remove women and children. General Burnside refused. Morally he was wrong, but he had the legal right to do so, if he thought the exigencies demanded this course. Prisoners are exchanged, and surgical instruments and medicine pass backwards and forwards. There are many other humane rules. But unfortunately, they are seldom ever adhered to in any War. And the records show, that in the War of the Revolution, and in the War of 1812, not only was every one of these rules set aside by Great Britain, but she also rejected even the limitations, placed by the Natural Law itself. For it is notorious, she aroused the Indians, by giving them whiskey, and put scalping knives in their hands, to scalp and murder the defenseless. It can now be no offense to repeat these well known facts, since they are recorded in history. Colonel Hamilton, the Governor of Canada, and his associates, when captured, were tried before the Council of Virginia, convicted, and the sentence, approved by Mr. Jefferson, for inciting the Indians to murder prisoners. This was the charge, and Mr. Jefferson put in the Declaration of Independence the statement.

“He has waged cruel war against human nature itself, violating its most sacred rights of life and liberty in the persons of a distant people who never offended him, capturing

and carrying them into slavery in another hemisphere or to incur miserable death on their transportation thither. This piratical warfare, the opprobrium of infidel powers is the warfare of the Christian King of Great Britain, determined to keep open a market where MEX (original) should be bought and sold, he has prostituted his negative for suppressing, every legislative attempt to prohibit or restrain this execrable commerce, and that this assemblage of horrors might want no fact of distinguishing dye he is now exciting these very people to arise in arms amongst us, and to purchase that liberty of which he has deprived them, *by murdering the people* upon whom he also obtruded them; thus paying off former crimes committed against the liberty of one people, with the crimes he urges them to commit against the lives of another."

This was stricken out, *not because it was untrue*, but as Mr. Jefferson said, the same passage condemned the Slave Trade, forced upon the Colonies by Great Britain, and a large party in New England and the extreme South, wished to continue the Slave Trade.

And Mr. Madison put in his messages during the War of 1812, the most terrible charges against Great Britain on the same charge of inciting the Indians to murder prisoners and the defenseless. See his Messages, Statesman Manual. And we knew full well that they burnt the Capitol, in violation of *every rule of both laws*. But enough of this.

LET IT BE STATED THAT BUT TWO COURSES WAS OPEN TO THE UNITED STATES ON THE SINKING OF THE LUSITANIA, AND OTHER LIKE OCCURRENCES.

First, if illegal, to have acted *upon that* theory and demanded reparation and declared War, if necessary. If War is ever justifiable, then *no more earthly necessity*, could ever exist, than grew out of these occurrences. Next, if the act under the Necessary Law of Nations was a lawful act of War or belligerency, *then Congress should have demanded to know*, by what authority these vessels were allowed to leave American Ports, carrying Contraband of War; *and why American citizens*, were allowed to travel on these Floating Arsenals, *where there was no power in the United States*, to protect their lives, *as was implied by* the passports that they carried. These questions will have to be answered in history and the just God will require an answer at the final Bar.

Had the President said to the proper officers, do not give clearance to leave American Ports with this cargo. (The clearance was a certificate of this import.) That is exactly what George Washington said; and he said more, that he would prosecute the men who attempted to make these shipments—and those who sold were prosecuted in the State Courts for violating by the sale the common law of the States.

(Messages and Papers, Vol. 1, Page 157).

Mr. Wilson protected them. There is the difference in course of the first President and the last. We have the results in both cases.

That is what Abraham Lincoln said, though in more direct terms when War occurred between France and Mexico.

(Messages and Papers, Vol. 6, Page 125).

EXECUTIVE MANSION.

Washington City, November 21, 1862.

290. "ORDERED, *That no arms, ammunition, or munitions be cleared or allowed to be exported from the United States until further orders; that any clearance of arms, ammunition or munitions of war issued heretofore by the Treasury Department be vacated if the articles have not passed the United States, and the articles stopped; that the Secretary of War hold possession of arms recently seized Rouse Point bound for Canada.*" (Abraham Lincoln, Messages and Papers, Vol. 6, page 125.) Why did not Mr. Wilson do that? If he had followed Lincoln or Washington our present difficulties would not be on us.

And had Mr. Wilson *said the same thing* and acted *along the same lines*, refusing to permit these shipments—whether of arms, munitions, cotton, wheat or other provisions, to both and the Belligerent armies—peace would have reigned throughout the United States, and *Espionage Bill* would have been unknown.

Such are the rights of belligerents. We now turn to the other branch.

THE DUTIES AND OBLIGATIONS OF NEUTRALS.

FIRST: *Who are Neutrals?*

“Neutral Nations are those who, in time of war, *do not take* any part in the contest, but remain common friends to both parties without favoring the arms of the one to the prejudice of the other.”

(Vattel Book 3, Chap. 7, Sec. 103.)

“As long as a Neutral Nation wishes securely to enjoy the advantages of her neutrality, she must in all things show *a strict impartiality towards the belligerent powers*; for, should she favor one of the parties to the prejudice of the other, she cannot complain of being treated by him as an adherent and confederate of her enemy. Her neutrality would be *a fraudulent neutrality*, of which no nation will consent to be the dupe. It is sometimes suffered to pass unnoticed, merely for want of ability to resent it; we choose to connive at it, rather than excite a more powerful opposition against us. * * *

“It solely relates to *war*, and includes two articles:—

“1. To give *no assistance* when there is no obligation to give it, nor voluntary to furnish troops, arms, ammunition, or anything of direct use in war. I do not say, ‘to give assistance equally,’ but ‘to give no assistance;’ for it would be absurd that a state should at one and the same time assist two nations at war with each other; and besides, it would be im-

possible to do it with equality." (Vattel Book III, Chap. 7, Sec. 104.) (Italics in the original.)

The authority of Vattel has never been questioned by any Department of the Government. And *the foregoing passages* where quoted and approved by Mr. Jefferson, as Secretary of the State, in our controversies with France; and were also quoted and approved, as setting forth the correct rule by Chief Justice Marshall, in an opinion. Vattel is a French Author and his work stands in about the same relation to International Law, as the New Testament does to the Christian Religion.

English Authority on the same point. The leading English authority lays down identically the same law to which reference is here made. To save space it is not her set out. This authority *goes farther than Vattel*, and affirms *that even the sale itself of arms by the private individual if not prohibited by the Government*, is a violation of International Law. We do not go that far.

See Philimore's International Law, Sections 229, 230 and subsequent.

Like the "Licentiousness of the Press," a matter here has been irrelevantly interjected, to confuse this subject. It is said: "*The sale by the individual is not a breach of neutrality by the Government.*" No one, with any intelligence on the subject ever claimed that it was. A rule may be stated which is universal on this subject. *The act of an individual is never the act of the body politic, or of*

the Government. And he who states that the sale *by the individual* is not the act of the Government, is simply indulging in childish prattle, or more probably, *seeks to confuse* the public mind, as has been done. The act of the private party who commits burglary, robbery or any other violation of law, *is not the act of the State.* In fact the very existence of the State, is to repress and punish these acts.

So in our form, as heretofore said, there is a division of powers. *The sale itself* by the individual *is illegal and immoral.* I adduce the highest authority. (That of the unimous position of this court by Chief Justice Chase, who, perhaps, understood this subject as thoroughly as anyone ever a member of the Court.)

He said: "The traffic is *illegal and immoral*, though not prohibited." He means of course by not prohibited by the Statute of the United States. "*Every eminent writer on International Law* has denied the rights of Neutrals to sell to Belligerents, *even within Neutral Territory*, or to transport such articles to belligerent ports, without liability to seizure and confiscation of goods and ships. And this is not an illogical inference *from the general maxim that Neutrals must not mix in the War.*" The Bermuda 3 Wallace on P. 552. This case was twice argued, on another point. The statement of the Chief Justice as to the testimony of "Every eminent writer of International Law, on this sub-

ject" is borne out by these authors. And it must be here borne in mind that the Court says, that the law follows from the general maxim, and that such traffic is "*mixing in the War.*" Let there be no misconception or quibbling on some of the language here used. The Court says, "Without liability to seizure and confiscation of goods and ships." *The very question*, in that case, was whether the goods and ship were liable to seizure and confiscation. And it was in that connection the words last above were used. The vessel was bound from an English port to Matamoros, Mex.—that is, from one *neutral port to another*. And the question was the right "*to seize and confiscate the goods and ship,*" which, as said, was twice argued. The Court does not say—and would not make the silly statement—that this *was all the remedy*, or that *it was right* to make the shipments. But it does say that the sale and shipment *itself was illegal, and therefore, should not have been allowed.*

Congress has the power to regulate commerce between the States and Foreign Nations. *It is idle* to claim that this clause can apply to commerce *which the decision says* all eminent authorities *declare to be illegal*. Is such the purpose of our Government to foster and protect what is illegal? Such a claim is beyond the domain of discussion.

The law of nations is a part of the common law.

The common law is a part of the law of all the

States except one. Therefore, *the sale itself* by the individual is a violation of the laws of the State.

"The law of Nations forms part of the municipal laws of Pennsylvania." (*Republica v. De Longscamp*, 1 Dallas, 114).

This is the decision of Chief Justice McKean, a signer of the Declaration of Independence.

The Laws of Nations is *a part of the laws* of the United States. In fact the Constitution expressly gives to Congress, to remove all doubt, *express power*, which would have followed as an incidental power to define and punish offenses against the Laws of Nations.

"The Laws of Nations is a part of the law of the United States." (*United States v. Smith*, 5 Wheaton P. 160, Chief Justice Marshall in the *Estrella* 4 Wheaton, 298; *The Pasquette Habana*, 175 U. S., 677-700-1.) And in another case, Chief Justice Marshall said, "The Courts of the United States *are bound* by the Law of Nations." And so are all the Departments of the Government bound. This was laid down as law by Mr. Jefferson as Secretary of State.

If all the above is true, and no one can question it, then let it be asked (and the Court and Country should carefully consider this) not as a matter of adverse criticism, but as important, both now and to the future, and as throwing light upon the right of the people to discuss this and all other public measures:

Where did the Administration find, either the precedent in our history, or the law, which authorizes the Administration to attempt to protect these sales *on land* and their shipments on the sea.

That the President did so is not only notorious, but it was this course which finally involved us in War. And now if by THE FREEDOM OF THE SEAS, the President means to *reverse* the settled and *humane* rules of civilized nations, upon this subject, and to *substitute* in its place, his contention, as to the right of sale and transportation, then this course, if recognized, *would abolish the law of Neutrality*, and inoculate every nation, *with the evils of War, whenever war occurred between any two nations*. In brief we would go back to the practices of a barbarous age. And this doctrine would inflict upon the human race, as great a calamity, as would be inflicted, if it was possible, by the decree of Government, *to expel and destroy the Christian Religion itself*. Let it be said "*The Freedom of the Seas*" is secure under "the Great American Doctrine." So plain has this always been since Mr. Jefferson's summarizing the principles of Vattel, put these forth *they have never been misunderstood*, in any respect, but have been acceded to by the civilized world. The only exception has been Great Britian, who with her great sea power, has refused to assent to this "Great American Doctrine," because it curbed her supremacy and monopoly of the sea. Under these, the smallest nation had the same right as the greatest. *Are these great principles which have guided all Admin-*

istrations, now to be cast aside, and we to be ushered into all the internal conflicts of European Nations, which has made their soil one of eternal blood.

Our trouble now is that the Administration practically set aside all these wise rules, both before and during this War. *Is a new rule now to take their place?* **ESPIONAGE BILLS IF SUS-TAINED WILL PREVENT A DISCUSSION OF THIS IMPORTANT MATTER.** This is one of its pernicious influences.

Are these States to go back under England? "Will you walk into my parlor said the spider to the fly." It is this great question the people cannot now discuss under the Espionage bill. *This War had a cause upon the part of the United States.* Leaving out passion and prejudices, which have been invoked in a matter so solemn, let an answer be presented in this way.

Suppose the Administration had said, as its predecessors, had said, except McKinley, we will afford to this trade no protection. Next, no license will be given to any Belligerent vessel to sail with contraband goods. The traffic is immoral and illegal; it is liable to seizure upon the sea and we cannot protect it.

Then again, suppose it had been said, no American citizen shall be allowed to travel on the passport of the Government on any Belligerent vessel. And then suppose the Administration had said, we will follow the advice of Washington and Jefferson

and as followed by all other Presidents, and "We will not mix in this European War." In the language of Washington:

"The great rule of conduct for us in regard to foreign nations is to have with them as little political connection as possible. Europe must be engaged in frequent controversies the causes of which are essentially foreign to our concern."

Does not everyone know that if this simple policy had been followed which both law and policy required at our hands we would then pursued our usual course; and we would have had neither war with the loss of thousands of lives, a debt which staggers imagination and an Espionage Bill making it illegal for the people to discuss public affairs, and which if sustained must prove the downfall of the Republic.

These matters have not been discussed from captious motives. Gladly would they have been avoided, but duty compelled their discussion. And the noble sentiment of Mr. Justice Curtis, in the Article before quoted from, is here adopted on this subject.

"This is not a government of men. It is a government of laws. And the laws are required by the people to be in conformity with their will declared by the Constitution. Our loyalty is due to that will. Our obedience is due to those laws; and he who would induce submission to other laws, springing from sources

of power not originating in the people, but in causal events, *and in the mere will of the occupants of places of power*, does not exhort us to loyalty, but to a desertion of our trust.

“That they whose principles he questions have the conduct of public affairs; that the times are most critical; that public unanimity is highly necessary—while these facts afford sufficient reasons to restrain all opposition upon any personal or party grounds, they can afford no good reason—hardly a plausible apology—for failure to oppose usurpation of power, which, if acquiesced in and established, *must be fatal to a free government.*”

George Ticknor Curtis' History of the Constitution, Vol. 2, pp. 671-72.

“Wherever law ends tyranny begins, if the law be transgressed to anothers harm. And whoever in authority exceeds the power given him by the law, and makes use of the force he has under his command to compass that upon the subject which the law allows not, ceases in that to be a magistrate.” Locke's Civil Gov't., Sec. 202.

Or as stated by Mr. Wilson, as a citizen. “An officer is an officer only so long as he obeys the law.”

And if infractions of law occur, especially when grievous in results, those who urge *silence*, in the words of Justice Curtis “do not exhort us to loyalty, but to a desertion of our trust.” Duty bids us speak.

OBJECTS OF THE WAR.

THE POWER OF WAR IS SOLELY TO CORRECT WRONGS
TO THE NATION DECLARING IT.

The consideration of this subject is closely allied to the last clause, and however regretful it may be, its discussion is necessary, in considering the Constitutionality of the Espionage Act; for it is this matter, important to the future of the country, that the Act prohibits among other things, from being discussed.

DECLARATION OF WAR.

It is required that there should be a formal Declaration of War by international law. This is not only required, but another object is that the offending nation may thus be officially notified, that it may accede or grant all that is asked. Vattel, Book 3, Chapter—

Such has been the course of the United States.

For instance, this was done in the War of 1812. On November 4, 1812, in its first message after this declaration, Mr. Madison said:

“Anxious to abridge the evils from which a state of war cannot be exempt, I lost no time after it was declared in conveying to the British Government the terms on which its progress might be arrested, without waiting the delays of a formal and final pacification.” Statesmen’s Manual, Volume 1, page 300.

Among the unprecedented acts we find that the Resolution *did not declare the objects for which the war was declared.*

Vattel lays it down that this is necessary, both for the information of the enemy, and for the information of the people, who are called upon to make the sacrifices of war. *Why was this not done?*

Mr. Madison, in different messages, repeats his continued efforts to make known our grievances, and to agree upon peace, and how these efforts were repulsed by Great Britain.

Since the commencement of the present war, on the contrary, no such communication has been made to the enemy, and to-day, while there have been many partisan and wild statements made, no one can give an intelligent answer *as to what were the actual causes which moved the United States to declare war.*

Again, hostilities have ceased, and Mr. Wilson has put forth fourteen terms, that the United States will insist upon. *What are they?* No one can state, with certainty, what they mean. A failure, therefore, to state the causes *at the beginning*, and a failure to state the demands *at the end*, so that ordinary people can understand them, is suggestive indeed. Coupled with this, is the further fact that on May 13, 1918 a few days after the Declaration of War, the President said: "*We have no grievances of our own to fight for.*"

If this statement was true, then nothing is

clearer, *than that Congress had no power, whatever, to declare war.* Our Government is one of limited powers; none are absolute. The power of even this Court is limited. It can exercise no original jurisdiction, except in those cases given by the Constitution. It can exercise no appellate power except in pursuance of an Act of Congress, which latter must be confined to the limitations of the Constitution. So Congress alone having power to declare war, *cannot declare war, except for an existing cause,* to redress wrongs to the United States—not injuries to other nations. This is clear. We then examine the causes put forth.

IN ORDER TO MAKE THE WORLD SAFE FOR DEMOCRACY.

In all the powers delegated to the United States, or any of its Departments, there is no power, if possible to be accomplished by war, to declare war "to make the World safe for Democracy." Under what clause, or under the general object, as set forth in the preamble, is power given to the General Government of the United States, to declare war *in order to carry Democracy to other Nations,* even upon the untenable supposition that Democracy, which rests alone upon the consent of the governed, can be carried by force and armies. It cannot even be done by treaty, since the treaty-making power must be confined to those matters affecting the United States. America can exercise a wonderful influence, and it has in the past, in making the World safe for

Democracy. But, it is through her just and equitable institutions; the freedom she secures to her own people, through which the shadows of her institutions fall as, the dew of heaven, upon others.

DEMOCRACY IS NOT ALWAYS LIBERTY.

It should be impressed on Congress and the President who have led us as a people into war in order to carry democracy to Europe that after all, democracy and liberty have not always been synonymous and dwelt together. And though rare, neither has Monarchy (though a perversion) and Despotism always been found together. In the work last above (2 Vol. p. 348), it is said of France under a Republic:

“Her democratic excesses have discredited the cause of popular government; the usurpations and bad faith of her rulers have shaken confidence in law and order. She has aimed at social equality; but—save in the leveling of her people—she is as far from its attainment as ever.” Mexico at our door is an example.

Turning to England “Let us” he says “turn from France to England—her neighbor and ancient rival. The history of the one in modern times, is the history of *democracy, not liberty*. The history of the other is *the history of liberty, not democracy*. It is the history of popular rights and franchises acquired, maintained, extended and developed with-

out subverting the ancient constitution of the State" (p. 349).

The above is a valuable lesson, which those who have involved us in this war would have done well to consider.

Our clothing must be fitted to the climate. And so must government be fitted to the people. To carry democracy to people fitted to enjoy it is *unnecessary*; to attempt to carry democracy to a people unfitted to enjoy it is *not only impossible, but is throwing pearls before swine*. No greater truth was ever uttered than that by Montesquieu when he said, in considering which is the best form of government, *we must "first consider the character of the people."* That to enjoy Democracy as a form of government the people must be possessed of the highest intelligence, virtue and patriotism. And when a people are thus fitted there will spring from the consent of the governed a Democracy of Law. Such a people will maintain it so long as they are fitted to enjoy it.

THOSE IN OUR MIDST, IF THERE BE SUCH, WHO WOULD ENTHRONE THE UNBRIDLED PEOPLE; AND THOSE IN OUR MIDST IN OFFICE—MORE DANGEROUS STILL BECAUSE OF POWER—WHO WOULD SET THEMSELVES ABOVE LAW, NEEDS MUST BE TOLD, THERE IS NEITHER TRUE DEMOCRACY OR LIBERTY OUTSIDE OF LAW; AND NO LAW OUTSIDE OF THE CONSTITUTION.

So when we went to war in order to carry democracy to others, as claimed, we did *an unlawful*

and unconstitutional act at war with our entire history and Constitution; next we attempted a foolish and impossible thing, because democracy can never be carried by one people to another through the power of the sword. Despotism may. Its strength is force.

Julius Caesar in his *World's Conquest*, professed the same object of carrying Democracy to others. He as stated by Gibbon, "made the world a wilderness." The scourge of the world, Napoleon, also professed that his mission was to carry Democracy by war to others. He conquered Europe, partitioned it among his Marshals and relatives, and established a despotism everywhere. He accepted the Imperial Crown "in order to secure equality and public liberty." And De Toqueville tells us "The Napoleonic schemes of exercising absolute power in the name of the people was conceived by Frederick the Great." So the present claim and method of carrying Democracy is not new to the world. The Court, and others should read an accurate description of this in "Democracy in Europe" by May, the Historian, Volume 2, Chapters 14--17.

But to be explicit, if it is true, as stated by Mr. Wilson that the object of this war is to carry Democracy to Europe, then it is a violation of the Constitution, and an unlawful use of the war power.

Second, it is said that it is to restore Alsace-Lorraine to France. That is no more of our business that the restoration of New Mexico and Southern

California to Old Mexico by the European nations. *War cannot be declared for this purpose.* Every sort of fanciful and imaginary, every impracticable and impossible object has been stated, but no man has stated in plain words, the wrongs for *which, alone, Congress can declare war.* And the fact (1) that the Resolution departed from precedent, and from law, in failing to state these wrongs; (2) the fact that after all occurrences complained of, Mr. Wilson was elected because "he had kept us out of war" notwithstanding these occurrences; and (3) now that hostilities have ceased and the parties are to meet in forming a treaty, although the President has put forth fourteen demands, not one of them, if they can be understood, *have any relation whatever to matters committed to the Government of the United States,* is most remarkable and significant.

And that this is true, is further verified by the fact that the President in 1916, went before the country seeking re-election because "he had kept us out of war," and but a few months afterwards he demanded, that war be declared in fact, *though no new conditions had occurred.*

MR. WILSON'S STATEMENT TO THE COUNTRY IN THE ELECTION OF 1916

In the official text-book of his party, put forth by his authority, there is a long recital of the controversies between the United States, Germany up-

on the one hand and England upon the other. At the end of the recital of the controversy with Germany this book sums it all up:

“THUS THE GERMAN CRISIS WAS DISPOSED OF AND THE UNITED STATES WAS FREE AGAIN TO GIVE ATTENTION TO THE OTHER BELLIGERENTS WHICH HAD BEEN HELD IN ABEYENCE IN THE PERIOD WHEN AN ACTUAL RUPTURE WITH GERMANY WAS LOOKED UPON AS AN IMMINENT POSSIBILITY.” (Capitals in original.)

Here it was stated, in this emphatic manner, *all controversy with Germany* had ended satisfactorily to the United States. Germany was given a receipt in full. Mr. Wilson went before the country *upon that distinct statement*. This was after the sinking of the *Lusitania* and other like vessels. If it had any pertinency to the present question, it might be asked how was it settled—*what was gained by the United States?* The answer is *absolutely nothing*. It ended where it commenced, except the correspondence. The United States had given clearance to these vessels. It had given passports to citizens to travel on these vessels. And in the settlement the United States *had backed squarely down and got absolutely nothing out of the controversy*. We ask the Court to read the whole controversy, as put forth to the people, from page 95 to 120. We can only quote a small part of it.

"THE FIRST NEGOTIATIONS.

"The first diplomatic correspondence between the United States and the belligerent governments was begun by the United States in August, 1914, *as a measure of preparedness*. The United States proposed that all of the belligerents accept the unratified Declaration of London as the code of international law to be applied during the war. The Declaration of London contained the most advanced international code of naval warfare which had been produced out of the experience of civilization. Although by no means satisfactory in certain respects, its provisions were more definite than the provisions of the generally accepted law of nations as to the interpretation of which there were differences of opinion." Democratic Text Book, page 105.

Here we see at the very commencement of the war in Europe the administration set aside, the advice of Washington and Jefferson, and not only pursued an unprecedented course, never pursued by the United States, and *in direct opposition of the principles of neutrality*. Here, the President crossed three thousand miles of water, and endeavored to lay down the rules by which the war was to be conducted. It was no business of the United States, under what rules the war was conducted. But the President, immediately asks that it be fought according to certain rules which would permit the sale of munitions and other contraband to each belligerent and guarantee their safe arrival. This com-

pletely destroyed the law of neutrality, as heretofore set forth and quoted from Vattel. This author says, "I do not say to *give assistance equally*, but *give no assistance*; for it would be absurd that a State should at one and the same time assist two nations at war with each other." Vattel, Book 3rd, Chapter 7.

And Philimore, the leading English authority, expressly states that the suggestion made by Mr. Wilson, was a violation of International law.

But above all this, what right had the United States to meddle with the European war. That was the commencement of this policy which lead inevitably to conditions which have followed. On the next page (106), it is said, Germany and Austria accepted, England rejected, and then it is added "Great Britain then proceeded to inaugurate a policy for the suppression of German commerce, which was promulgated by a series of radical Orders in Council."

It is said that the United States then gave notice that its policy would be to insist upon the rights and duties of American citizens, as they were found in the rules on international law. *This was right.* But has the government lived up to them?

Germany proceeded to sink British vessels, *and the United States protested.* This is all set out at length. But is there any international law which would prevent one belligerent from sinking any or all of the vessels of its enemy under the natural law

of nations? Or if there was, is there any law making it either the right or duty of a neutral nation to protest? That is "to mix in the war" which this court says is illegal. It is said the United States notified Germany that they would "take any step that might be necessary to take to safeguard American lives and property to secure to American citizens the full enjoyment of their natural rights on the high seas."

But it was assumed that American citizens had rights on belligerent ships, when every one knows that *they had no rights* on such ships, other than those they had in a fortified city or fort.

If they had, why did not this government protect those rights? They were drowned in large numbers, and the Administration did nothing.

This campaign book says (page 104), the President issued a Proclamation of neutrality, saying "Each proclamation defined for American citizens the limitations fixed by International law and the laws of the United States upon their activities in a time of conflict between powers with whom the United States was on terms of amity. These included specific inhibitions as to giving aid to either side *by fitting armed ships, supplying the armed ships of belligerents, or otherwise aiding the belligerents to utilize the waters and the coast of the United States as places of military operations.*

But why was there no notice not to transport these contrabands to the Armies abroad?

Out of this failure eventually came the war. And out of the war came the Espionage bill. Can any rational difference be suggested, why to furnish contraband to a vessel is a breach of neutrality; and to furnish it to *a vessel to be carried to a fort or army* is no breach of neutrality. Yet that is the position of the administration.

THE COURSE OF GREAT BRITAIN.

This book says "One of the most vexatious practices which Great Britain and France had indulged in with respect to neutral intercourse was her interference with neutral mails. The two governments had adopted the custom of removing and censoring the mails aboard the neutral ships *which she took into her ports for inspection.*"

Is there any law that will authorize these seizures of our vessels? We said not by the war of 1812, yet they continued without interruption.

This book shows repeated and continued aggressive acts against our rights, even to the use of our flag and seizing our mails. No remedy was granted.

This review is here ended, with these general observations. If the course pursued by the United States is examined by the record; if this campaign book is examined in detail, *these things will appear clearly.*

First, the Administration departed from the set-

tled practice of this country—a practice demanded by International law and the preservation of peace.

Second, that it submitted to the aggressions of Great Britain upon our rights.

Third, that it endeavored to protect on sea the shipment of munitions and other contraband to Great Britain. And when Germany sunk these vessels by U Boats—her navy being driven from the sea by the superior power of England—then the United States said this was inhuman. Authorities cited show it to be a lawful act of war.

But suppose it was not a lawful act of war; SUPPOSE IT WAS INHUMAN, what business is that of either the President, or the United States? When did it become the duty of the United States to intercede in European wars, BECAUSE THEY WERE INHUMAN? Let it be asked, when was there ever a European war—and there has scarcely been a period when there was not one raging—that has not been conducted inhumanly, and to advance the interest of Kings, Kaisers, Czars, Sultans, and other monsters who rule by arbitrary power? And if the United States had intervened in all these wars because of inhuman practices, as Mr. Wilson claims to have done, (or is to do so hereafter) then instead of our magnificent Constitution “securing peace and the blessings of liberty,” which was one of its main objects, we would have been in perpetual war. CONSCRIPTION would have been perpetual; ESPIONAGE bills, instead of freedom of the Press and

Speech would have been the deplorable and the perpetual condition of the United States.

In brief, heretofore, our policy has been, as marked out by Washington, and we have allowed these European nations, in accordance with his advice, to fight out their inhuman wars, and to settle among themselves the rivalries of their despotic Rulers. We have, in a word, also kept the advice of the immortal author of the Declaration of Independence, who wrote:

"I am not for entering that field of slaughter to preserve their balance, or join in the confederacy of Kings to war against the principles of liberty. *The first object of my heart is my own country.* (Jefferson to Gerry, Vol. 3, p. 479)."

There is the American doctrine. There is the doctrine of every true and honest patriot. And there is the doctrine that brought in the past to our now aggrieved land, Peace, Prosperity and Happiness. Especially is this the view of those *who carry Revolutionary blood, and hold to Revolutionary principles.*

As said by Washington, in his Farewell Address, urging us against our present course: "Europe must be engaged in frequent controversies, the cause of which are essentially foreign to our concerns. The real patriots who resist the intrigue of the favorite are liable to become suspected and odious, *while its tools and dupes usurp the applause*

and confidence of the people TO SURRENDER THEIR INTERESTS."

Is not that the precise condition of our country today? The man who boldly stands up for America, her Constitution, her institutions of enlightened liberty; her laws of equality of classes under the law—who resists the effort to involve us in the controversies of Europe, is even charged with disloyalty by the truly disloyal. While the tools and dupes of European interests "*usurp the applause and confidence of the people to surrender their interests.*"

And as a part of this last policy the right to freely criticize these public measures is taken from the people and they must stand by silent and powerless to resist every aggression upon their most sacred rights.

THIS COURT CAN PRESERVE THE CONSTITUTION, RESTORE OUR LIBERTY; PLACE IT UPON A FIRM BASIS, OR IT CAN SAY, THAT THE HERITAGE OF THE PRESENT AND OF THE FUTURE, IS THE DOOM THAT HAS EVER MET FREE INSTITUTIONS IN ALL LANDS THROUGH THE USURPATION OF RULERS. WHICH WILL YOU DO?

So to end this long presentation. First: We have a war commenced without any definite statement of causes or objects. Second: The war ended with no definite demands of the redress of any matter *concerning the United States*; or of any compensating concessions, or redress affecting the United States, or their rights on land or sea.

The *whole result* secured by the war is the complete supremacy of the sea power of Great Britain is made permanent. Germany, as a rival, is out. The high tariff policy of the United States will be made permanent and so increase the cost of vessels. The United States are also out, and under the necessity of paying tribute to England without a competitor. It is well, in Court at least, to tell the truth.

A DEFINITE WRITTEN CONSTITUTION;
A DIVISION OF POWER; CHECKS AND BAL-
ANCES INDISPENSIBLE TO A FEDERAL RE-
PUBLIC.

All experience; the testimony of the learned and patriotic in all ages attest the truth of the above. As science has never discovered how to overcome the law of gravitation, so too will men never discover how to preserve free institutions except as above.

When the Constitution was pending it was urged by the opponents that there was an undue union of the Legislative and Executive branches, and this was destructive to the liberties of the people. The principle was admitted; but the fact was denied.

"It may justly be regarded as the very definitions of tyranny."—The Federalist No. 46.

It will thus be seen that this great authority declares that a union of the two *was the very definition*

of tyranny, and that if the objection existed there needed no other reason *for the rejection of the entire Constitution*. Montesquieu, to whose great work the framers of the Constitution were so greatly indebted, declares that where this union of legislative and executive exists "there can be no liberty;" and in the graphic account of how the Roman people were enslaved Gibbon says of Augustus "he destroyed the independence of the Senate;" and further: "When the executive dominates the legislature *there is an end of all liberty.*" This is a truth so well established that it needs no elucidation.

But above theory *the fact is* our whole system of Government is founded upon the idea of a *division of power*, and absolute power in no man or men. *It is a living, vital existing fact in our system.* The Constitution divides power. It vests in the General Government of all the States certain definite and named powers; it reserves to the States and people everything else. It then divides the powers of the General Government and places them in three *separate, distinct and co-ordinate departments*. It provides checks by one department upon the other.

It is these features which distinguish our system of Government from all of the European Governments, and from all others that have ever existed. And it is the only plan possible to free governments.

MR. WILSON'S VIEWS ON THE ABOVE.

These views are not set forth in a captious spirit or merely to criticise. But as he has demanded an Espionage Bill to silence discussion of public matters his views upon this question throw light upon the character of the Espionage Bill demanded by him.

As said by Mr. Hallam in his great work.

“What might be affected by a King, at once active, popular and ambitious should ever such *unfortunately appear* in the country, it is not easy to predict; certainly his reign would be dangerous on the one side or the other, to the present balance to the Constitution. But against this contingent evil, or the far more probable encroachment of Ministers, which though not going to the full length of despotic power, might slowly undermine and contract the rights of the people, *no positive statute can be devised so effectual as the vigilance of the people themselves, and their increased means of knowing and investigating the measures of Government.*”

2. Constitutional History, Chap 16.

And how much more dangerous is such an individual should he arise, as has been the case, in a Republic, and practically all power placed in his hands, with the added danger *these measures are no longer open to discussion.* Does not every reflecting mind see that Constitutional Government is ended?

Mr. Justice Curtis, in his great argument before quoted says:

“And when we advance to that highest conception of human law, known practically in our country only, and come to Constitutional Law, the embodied will of the people, by which they govern the Governors, *what Governors are beyond its control, what citizen is too low for its protection.*” (2 Curtis’ History of the Constitution, Page 683.)

Both the justice and bearing of these observations on the present question cannot be questioned by anyone having a correct conception of our form of Government, and the responsibility of those in Office to the people. Our Government is not founded on the theory of *infallibility of rulers*. If so, it could not last. I therefore bring forward clearly expressed views of Mr. Wilson, as throwing light upon the Constitutionality of the Espionage Act, *which he demanded to supplement Conscription.*

In his work Congressional Government printed as late as 1900, pages 284, 285, Professor Wilson says:

“It is, therefore, manifestly a radical defect in our federal system that it *parcels out power* and confuses responsibility as it does. The main purpose of the Convention of 1787 seems to have been to accomplish this grievous mistake. The ‘literary theory’ of checks and balances is simply a consistent account of what

our Constitution-makers tried: *and those checks and balances have proved mischievous just to the extent to which they have succeeded in establishing themselves as realities.*" Congressional Government by Prof. Woodrow Wilson (printed in 1900), pp. 284, 285. (Capitals and italics are mine.

Here it will be seen that the President says that this division of power is "*a radical defect in our Federal system.*"

Again at page 318, 19 of the same work he says:

"As at present constituted, the federal government lacks strength because *its powers are divided*, lacks promptness because its authorities are multiplied, * * *. *This is the defect*, to which, it will be observed, I am constantly recurring; to which I recur again and again because every examination of the system, at whatsoever point begun, leads inevitably to it as a central secret. *It is the defect which interprets all the rest, because it is their common product.*" Congressional Government by Prof. Woodrow Wilson, pp. 318 and 319.

"The best rulers are those *to whom great power* is entrusted in such a manner as to make them feel that they will surely be abundantly honored and recompensed for a just and patriotic use of it, and to make them know that nothing can shield them from full retribution for every abuse of it." Same Work, p. 284.

He here says that this division of power is the defect to which he is constantly recurring. *An ex-*

amination of his works will show this to be a true statement of his views. Absolute government is the very basis of his whole political theories. That is to say, the very system as it exists under our Constitution, and which was thought to be the only means of securing free Government, Mr. Wilson states is a radical defect in the entire system. There is but one other system known to men—and that is the system of absolute power in a ruler or rulers.

But in the following passage Mr. Wilson comes out, if possible, more emphatically. He here says, if the full context is referred to, that the Constitution *is in fact founded on a division of powers and checks; but that no such Government can be so successfully conducted, as in fact constituted. That is to say, the people elected a gentleman who gives it as his deliberate judgment that the Government of the United States, of which he is the Executive head, cannot be conducted under and in accordance with the Constitution. And let not those who elected him complain, that he has consistently, in the office carried out his clearly expressed view and conducted it on another theory, than that on which it is founded.*

He wrote: "The makers of the Constitution constructed the Federal Government upon a theory of checks and balances, *but no Government can be successfully conducted upon so mechanical a theory.*"

Constitutional Government by Prof. Wilson, P. 117 (Italics mine).

The Constitution so constructs the Government, and if it cannot be thus conducted, it can only be conducted in one other manner, namely: *the absolute and uncontrolled will of one man*. Is it being so conducted?

He also wrote: "I am not repeating the famous sentence of the Massachusetts Bill of Rights 'to the end there may be a government of laws and not of men' *there never was such government*." Constitutional Government, 217.

If there was never a government of laws and not of men, then monarchy or absolute government is the only form, and Democracy a dream.

Suppose that the Fathers could return and they be told that there could be no such thing as a Government by law.

Entertaining these views Mr. Wilson *logically and consistently* makes the following pertinent statements:

In Old Master p. 177-178 (a book that is not out of print, but now cannot be purchased, and has been taken from libraries I have called on) Mr. Wilson advises the adoption of a ministerial government in the United States from England and says, "I am strongly of the opinion that such changes would not be too great a price to pay for the advantage secured us by such a government."

Without quoting at large, he declares that sovereignty in the people is a dogma. If so, how can Democracy be safe or exist anywhere? He says we are a nation because we once obeyed a King and can only remain a nation by learning to obey rulers. This vicious principle strikes down Democracy everywhere, and raises Autocracy as the only government. He says:

"The impression is inevitable that we started with sundry wrong ideas about ourselves, we were dreaming." Old Masters, etc., p. 99 and 104.

"Except in so far as his power of veto constitutes him a part of the legislature, **THE PRESIDENT MIGHT, NOT INCONVENIENTLY, BE A PERMANENT OFFICER.**" Congressional Government, p. 254.

He here advocates the adoption of the ministerial form from England and a life tenure for the President. The prominent ideas were the Revolution; the Declaration of Independence and the Constitution. Were these wrong ideas? Again, let not those who elected him now criticise his measures. As President, Mr. Wilson has but practiced the principles of Government, *that he advocated* as a citizen and professor. Let execrations fall upon those who gave him power. *But what flood of light do these views throw, upon the question we are now considering, as to the legality of Espionage Bills, and Conscription, that he demanded. They are both consist-*

ent with the arbitrary views of Government that he boldly put forth. BUT THEY ARE UTTERLY INCONSISTENT WITH ALL THE PRINCIPLES SET FORTH IN THE GREAT DECLARATION OF INDEPENDENCE; HALLOWED BY THE SUFFERINGS OF VALLEY FORGE; TRIUMPHANT IN THE SHOUTS AT YORKTOWN, AND RENDERED SACRED, AS THE HERITAGE OF A FREED PEOPLE BY THE PROVISIONS OF THE CONSTITUTION WHICH WAS TO BE THEIR PROTECTION FOR ALL TIME BUT WHICH IS SET ASIDE IF THESE MEASURES ARE TO BE SUSTAINED.

THEREFORE LET JUSTICE BE DONE MR. WILSON. He did not hide his light under a bushel; he proclaimed from the housetops as an individual his sentiments, and with these declared principles he was twice elected to the Presidency. And let not those who elected him, as some are doing, now condemn him for carrying out as President, the principles that he proclaimed, as a Professor.

In a word, Mr. Wilson in another work, *Constitutional Government in the United States*, page 215, printed only the year before he was elected President, points out how the President, as he terms it, may "*become national boss.*" Now let not those who elected him, with these well known views, upbraid him and charge that he has become a "national boss," as some are now charging.

Professor Wilson wrote two large volumes of about 400 pages each. "*Constitutional Government*" and "*Congressional Government.*" He

quotes in neither a clause of the Constitution; no American record; no proceedings of the Constitutional Convention; the opinion of none of the Statesmen of the Revolutionary period as to the character of our Government. The only author he quotes in either is Mr. Baghote, a silly English story writer upon the English Constitution, who interlards his sophomoric work with silly references to the Government of the United States. *He is quoted in every chapter*, and sometimes on almost every page, and there are a few quotations from Senator Lodge. These are his authors and I challenge also the production, from these works, *of any commendation of our Constitution and form of Government*. As a fair sample, he says in his works that sovereignty does not reside in the people but in the Government. This is the English and monarchial theory. That there is no such thing as a Government of laws but governments are of men. And that the need of the hour is *more power in rulers, or men*.

It may be said without exaggeration, in pursuance of this principle, that every power lodged by the Constitution in Congress now rests in the hands of the President, either by assumption or the action of Congress. That every power reserved to the several States also resides in his hands, and that the powers reserved to the people themselves are under his control. Congress has no power, for instance, over domestic commerce, yet it all now rests in the hands of the President. For example, the people

now must carry a pass (as the negroes in slavery did to buy whisky) to buy sugar; the farmer must separate the chickens and sell unfertilized eggs. From these trivial matters, on up to the greatest, *the President is in complete control.*

The people once went to Constitution and laws, in pursuance thereof, to learn the powers of government. They must now go to rulers to learn what privileges they concede the people. Of vested rights they have none.

When such conditions exist, it is not necessary to say that the Constitution has passed away, and that a one man Government has taken its place.

But let Mr. Wilson himself testify as to the character of the Government that would exist under such a system. In his work "The State," he devotes about 100 pages to the governments of Greece and Rome. As to the last he has a chapter headed: "TRANSMUTATION OF REPUBLICAN INTO IMPERIAL INSTITUTIONS UNDER AUGUSTUS."

He says:

"The imperial office was not created out of hand, but was slowly pieced together out of Republican materials; and the process of its creation was presided over by Octavius," (known as Augustus Caesar) "the best possible man for the function, a man who was at once a consummate actor and *and a consummate statesman.* Of course there was and could be no concealment of the fact that pre-

ponderance in the State had been given to one man. * * * What it was possible and prudent to conceal was, *that one man had become permanent master and that republican institutions had been overthrown.* * * * All that was desired was accomplished by the use of regular Republican forms. *The frame work of the old Constitution was left standing. But new forces were made to work within it.* * * * *Then it was that the process began which was to put the substance of an empire into the form of the Republic.* * * * Augustus still sitting and voting in the Senate like any other Senator, distinguished from the rest neither in position nor in dress, demeaning himself like a man among his equals. *In reality, however, he was of course Dictator of every step of importance, the recognized censor upon whose will the composition of the Senate depended, the patron to whose favor Senators looked for the employment which gave them honor or secured them fortune.* Long life brought Augustus into the possession of an undisputed supremacy of power, in the exercise of which he was hampered not at all by the Republican forms under which he forced himself to act."

This "crafty tyrant" as called by Gibbon; abhorred and detested by the world, Mr. Wilson calls "a consummate statesman."

Mr. Wilson further says, "*Augustus was the State personified. The Senate was indeed the creature of the Emperor.*" The State, page 110 and subsequent. Is it necessary to ask is there a "*Transmutation of Republican Institutions*" to-

day in our own land? The facts are well known, AND A CONGRESS ON THE DEMAND OF THE PRESIDENT HAS MADE THE DISCUSSION OF THESE MATTERS ILLEGAL AND A FELONY. WHAT THEN BECOMES OF OUR MAGNIFICENT CONSTITUTIONAL FORM OF GOVERNMENT.

SOME IMPORTANT MEASURES OF THE GOVERNMENT WHICH IT IS ILLEGAL TO DISCUSS; OR TO ASSEMBLE AND PROTEST AGAINST.

SEIZURE OF RAILROADS AND OTHER PRIVATE PROPERTY.

No person shall "be deprived of life, liberty or property without due process of law."

"Nor shall private property be taken for public use without just compensation." Cons. U. S. Art. V, Amendments.

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." Article IV, Constitution U. S. Amendment.

Thus stands the Constitution. It is the supreme law. Are they in force today as laws?

The President took an oath "I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States and will, to

the best of my ability, preserve, protect and defend the Constitution of the United States." Art. II, Sec. 1.

The above is the supreme law. Congress has no authority by law to violate these provisions; *nor has it any power to authorize the President to set aside his oath and violate them.*

Yet in violation of these clear provisions, railroad property running into billions; telegraphs and telephones have been seized and taken from their owners. *No one will claim there is any law for this*, and as said by Locke (Civil Government) "where law ends, tyranny begins." Again men, occupying no office known to the law nor proceeding in any manner known to law, regulate the private business of every citizen. Though no bill of pains and penalties can be passed under the Constitution, nor rights affected without trial, they order men to cease business for a definite period, and one in this community without warrent, enters upon private premises, seizes sugar and says he is going to give it to others. If this can be done one man's wife or his house can be thus taken, and given to others; and the same clause that protects property, *protects life also*, and life itself may also be taken. Yet these acts are no more in violation of the Constitution than many acts by high officers.

Such is the spectacle today presented to the American people, and this is the form of Government, under which they are living and *which this Espionage Bill prohibits them from discussing and*

protesting against. And let this Court courageously meet this condition, and say if it is legal.

And what has been the result? Passenger and freight rates have increased to the people one-third. One billion of dollars has been illegally taken out of the public treasury and expended on these railroads, which is a clear gift to them since the United States being a trespasser, the money cannot be recovered.

WHEN IN WAR CAN THE PRIVATE PROPERTY OF THE CITIZEN BE TAKEN? The Supreme Court has decided that question, but it needed no decision.

See *Mitchell v. Harmony*, 13 Howard 115;
Dow v. Johnson, 10 Otto 158.

In the first case Colonel Mitchell *during the Mexican War*, acting under Colonel Doniphan's order, refused to allow Mitchell to stop in New Mexico with his teams and goods. He lost his teams and goods and sued Mitchell after the war and recovered a judgment. The Court says the question is under what circumstances private property may be taken "*in time of war*" and then adds:

"And the question here is, whether the law permits it to be taken to insure the success of any enterprise against the public enemy which the commanding officer deems it advisable to undertake. *And we think it very clear the law does not permit it.*" (pp. 134-5).

And the Court holds that private property, be-

longing to a citizen, whether found in the United States or in a foreign country is under complete protection of the Constitution and can only be taken by the United States, *first*, when about to fall into the hands of the enemy; *second*, when needed for immediate use admitting of no delay and to carry on a distant enterprise, is not such enmity.

This case was affirmed in the other after the Civil War.

MONEYS ADVANCED TO FOREIGN NATIONS.

It is unnecessary to ask by what power was about 10 billions taken from the treasury of the United States, and transferred to the treasury of European nations. There is no power to tax the American people, nor to lend their credit, to any foreign nation. It cannot be loaned to American citizens. Congress may "lay and collect taxes" under the Constitution. It is not necessary to go to the Constitution to ask for what purposes? The very nature of sovereignty and of government, answers the question. But the Constitution says "To pay the public debt and provide for the common defense and the general welfare of the United States." This is not a public debt and the other ground refer to the general welfare, as embraced in other clauses of the Constitution. And it is a notorious fact that this money went to pay for munitions, supplied by the great trusts, and which were shipped in violation of the laws of neutrality as pointed out elsewhere.

THE POSTOFFICE AND MAIL.

Letters and mail packages are opened, and the right of the people to the use of the Postoffice is subject to this system of Espionage. Yet the Supreme Court has decided this to be illegal and that letters and sealed packages can only be opened under a regular search warrant. *Ex parte Jackson*, 97 U. S. 727. And in 1830, Mr. Calhoun, the head of a special committee, reported to the Senate that *there was no power* in the Government of the United States to refuse to carry newspapers, or to open them. This report was supported by both Clay and Webster and almost unanimously passed the Senate although the papers were Abolition papers, circulated to excite the negroes to insurrection.

It is useless to discuss this matter farther. It may be covered in a few words. Every right won by the Revolution and secured by the Constitution has been set aside.

CONSCRIPTION.

PRELIMINARY STATEMENT.

The Court in the *Avers* case, followed in others, in February, 1918, held Conscription by Congress to be valid. This power was held to be incident to the power to raise armies and to declare war, and the Court says that the objections urged are frivolous, and as those objections were stated by the

Court, they were so. It is unfortunate that men will rush into a cause upon which the fate of the Union depends, upon objections so frivolous. Mr. Davis files an ingenious brief. No reflection is made in saying, that it was not a fair and candid brief, since it was well calculated to deceive the Court and as I insist in fact did mislead the bench.

This subject cannot be here reviewed as its importance demands. It would take a hundred pages; and it is not necessary since the question is not directly involved, but only as an incident, in considering the validity of the Espionage Act, which prevents a free discussion of a matter so important. But in a few pages we shall completely demolish that brief, and it can then be seen what is left of the short opinion which in the main followed the brief. It will do so, *not, of course, by any power of the author*, but simply by bringing forward the unquestioned historical facts and legal principles which cannot be questioned. As said it is not a complete review. As Conscription or seizing of the citizen, is a necessary companion of the Espionage Bill, the two go together.

STATEMENT OF THE QUESTION.

The question divides itself into two branches.

FIRST: The constitutionality of Conscription *generally* under the Constitution.

SECOND: The constitutionality *of this par-*

ticular Conscription Bill, to carry on a European war of invasion; for if it should be conceded—which is not—that all of the precedents of Conscription claimed to have existed in the United States were true, it by no means follows *that the present Conscription Bill is valid*. This we suggest is a just criticism of both brief and the opinion in the cases referred to.

CONSCRIPTION ON THE CONTINENT OF EUROPE AT THE TIME THE CONSTITUTION WAS FRAMED.

Conscription as a lawful means of raising armies *was totally unknown* on even the continent of Europe *at the time the Constitution was framed and adopted*; and it had not been employed as a lawful means—or an incidental means—to the raising of armies, since the fall of the Roman Empire, or for about sixteen hundred years.

FIRST: *Napoleon in establishing a World despotism commenced, feebly in 1793, to inaugurate conscription, for the first time in Modern Europe. In 1798 this system was originated and perfected.*

SECOND: *At the time the Constitution was framed and adopted, Conscription or Draft did not exist in a single European Country. It was originated by General Jourdon just as in the United States, as it is exists under this bill, it was originated by General Crowder.*

As by means of Conscription and suppression of free speech Napoleon conquered Europe he forced Conscription on every country he conquered. Among others, he forced it on Germany and Prussia. From this commencement, it spread to all the despotic Governments of continental Europe, so that it exists at the present time *in all*, as stated by Mr. Davis and the Court.

I will prove this proposition by the very authorities cited by Mr. Davis himself. If these claims I advance are sustained, then before it can be shown that the Constitution gave the power to Congress of Conscription *as merely incidental* to the express power to raise armies, and declare war which forms the whole basis of Mr. Davis' brief and the Court's opinion—then those who claim it was given, as such incidental power, *must show* one of two facts. *Otherwise their whole claim falls*, and it is useless to go further into the discussion.

First: That the above statement is untrue; or

Second: That it was the object and purpose of the Convention that framed the Constitution, and the States in adopting it in "order to secure the blessing of liberty," to authorize a measure over citizens, deemed repugnant to the liberty of mere subjects, even in the absolute monarchies of continental Europe.

But as preliminary, why was it not shown that Conscription or Draft existed on the Continent of

Europe at the time the Constitution was adopted? If this had been shown, it is not admitted that it would have been of any weight—since we were founding Governments on a different theory. But if it *did not exist then*, and now exists, it simply proves, that in those countries Governments have become more despotic with time.

As to the last or second branch, nothing need be said, except to turn to the Preamble, for the professed objects, and to the whole Constitution and history.

CONSCRIPTION UNKNOWN ON THE CONTINENT AS A
LAWFUL MEANS OF RAISING ARMIES IN 1777.

For proof of this in full, reference is made to the two authorities referred to hereafter and cited by Mr. Davis. He says (brief page 16) “That compulsory military service is enforced practically by all Nations of the Globe *at the present time is a matter of common knowledge.*” And the Court says (Avers case): “To do more than state the proposition is absolutely unnecessary, in view of the practical illustration afforded by almost universal legislation to that effect *now in force.*” That is to say explaining, the Court says, that Conscription is valid, and no other reason is necessary to be stated, *except the universal legislation to that effect in other countries now in force.* Now suppose the court had said the right of Suffrage did not exist;

the right of electing a Congress and a President; the right to Republican Government in the States; and the right to Federal Government of the United States of all the States, *none of these existed in the United States*. And then suppose the court had said that nothing further is necessary to show that all these things *did not exist*, than point to the "illustration afforded by the almost universal legislation to that effect now in force," i. e., in other countries. The very reason given, *and in fact the main reason* given by the Court to justify Conscription, in the United States, would justify monarchy and all of its attendant principles by indentially the same reasoning. For the same proof exists.

And therefore Conscription is valid in the United States, because now valid in Germany, Prussia, Russia, Spain, Turkey, China, Japan and Mexico. The cause of Constitutional liberty is greatly indebted for this frank admission of the true basis of General Crowder's Conscription Act.

And I say confidently, that by the course above, Conscription can be sustained *and by no other*; namely, that it exists in the despotisms of the World, *Ergo* it is lawful in the United States. And both brief and Court in a foot note, cite the fact as a reason why Conscription is legal in the United States, that it is legal at present in other countries among them Germany, Prussia, Russia, Italy and even Turkey, China and Japan. But why did not Counsel and Court show, that it did not exist in the

first countries, even in 1787 when the Constitution was framed, *when upon their theory* (which I repudiate) if it did not *then exist* in those countries, it was not given as a lawful power in the United States?

But now let us turn to Mr. Davis' authorities. He cites in support of his proposition *Encyclopedia Americana* Vol. 5 Title *Conscription* *Encyp. Britannica* 11th Ed. Vol. 6, Title *Conscription* and a pamphlet by the War College. See brief page 16. And in a foot note from the *Statement's Year Book*, he cites a long list of European and Asiatic and South American depotisms, *including Mexico*, where *Conscription* is in force. And in a foot note to the opinion, the Court cites the same Governments on the same point.

We will now quote very briefly from the authorities of the Solicitor General and of the Court. We ask that the authorities themselves be read in full and they will sustain the statements herein made, and let the further article *Army* be also read in the *Encyclopedia Britannica*.

"The word occurs for the first time in the laws of France 1798, which requires service of all from twenty to twenty-nine. * * *

There is perhaps no law on the statute books of any nation which have exercised and is destined in the future to exercise a more far reaching influence on the future of humanity than this little known French Act of 1798, *introduced by General Jourdon*

to the Council of four hundred, for it was a power thus conferred upon the French Government, *which alone rendered the Napoleonic conquest possible.*" (Encyclopedia Britannica Vol. 6, p. 972 "Conscription.") This work goes on to say, that it was adopted in "defiance of the opinions of the greatest reformers that France had discovered, and of a very large proportion of the whole community." It further explains at length, that Napoleon *through this means of Conscription* made his conquests. And let it be said that he asked for, and obtained, that other relic of despotic power, the suppression of free Speech. He too professed as his object "*to carry Democracy*", but when he had conquered these countries he established despotism. And as the authority above explains the *present continental system* of armies by Conscription (which the brief and opinion seems to think one of merit), was evolved out of this measure, which came out of the bloody and lawless French Revolution; and it should cause those who now maintain such laws as lawful in a Government under our Constitution, to cry out and ask that the mountains fall upon them. Liberty under the Constitution is then to be measured by the revolting principles of the French Revolution; this was the parent of modern Conscription.

And this work further says, speaking of Napoleon's conquest, "and as each slice of territory was absorbed, *the French law of Conscription was immediately enforced and established.*" Enc.

Brit. Vol. 6, p. 973). And it is now sought to be engrafted on to our Constitution formed ten years prior.

“It was, however, to France that we owe the modern principle of universal compulsory service. One of the earliest and most serious problems of the French Revolution was the question of an adequate supply of men. In order to meet this the now famous Conscription Law of Jourdon became in 1798 the law of the country and remained until 1870. This law, *the basis of all continental system*, definitely asserted the right of Government to require every qualified citizen to serve in the Army from his twentieth to his twenty-fifth year. Since 1870, with the exception of Great Britain, all the great powers have adopted the principle of compulsory service. In the Republic of Switzerland there is universal service, but in marked contrast to all other continental countries, there is no standing or permanent Army.” The new International Encyclopedia Vol. 5 Conscription Page 777.

Now did the Convention, in framing the Constitution in 1787, give as an incidental power to that of raising armies and declaring war, the power of Conscription, which was unknown at the time on the continent of Europe and which was never enforced for ten years after by the despotic decree of the Council in the French Revolution. Did they legalize a system then deemed too despotic for Continental Europe?

Every man knows it did not, and it is useless to argue with any who will contend that they did.

CONSCRIPTION FIRST IN EUROPE.

In ancient Athens every citizen was enrolled in the Guard to defend the City in case of invasion and to prevent riots. It was a police force or city militia.

Julis Caesar, in raising his immense armies, and in conquering the World and establishing his despotism, *introduced Conscription from Asia*. He was followed by his nephew and adopted son the crafty tyrant Augustus Caesar who overturned the institutions of his country, also employed Conscription and the suppression of free Speech. When this despotic Empire fell Conscription ceased to be a means of raising armies on the continent, until revived, *ten years after the Constitution was adopted*, by France.

And we shall next see, as stated in the foregoing authorities it never was adopted in England.

CONSCRIPTION IN ENGLAND.

Draft or Conscription into the Army has ever been regarded as illegal under the English Constitution, and has been for nearly six hundred years so declared; and as repugnant to Magna Charta. It has always been regarded as repugnant to English

Liberty; and in remote ages, when employed, was by *usurpation* through the claimed prerogative of the King.

(Hallam's Constitutional History of England Vol. 2, page 259 and subsequent; Hume's History of England, Vol. 4, page 350 Appendix, Reign of Elizabeth (Claxton's Ed., Phila.) May's Constitutional History Vol. 2, page 259 and subsequent; 1 Blackstone's Commentaries, "The Military and Maritime State" Book 1, Chap. 13, p. 408.)

The above proposition is as well established as any in English history. Many authorities could be cited, but the above leading authorities are sufficient. If this is true, then let this be asked:

Did the Colonies declare their independence, and that they were henceforth Free and Sovereign States; did they afterwards establish a written Constitution "to secure the blessings of liberty," to a greater extent than they enjoyed under England and then turn around and give a despotic power, which was at all times regarded as repugnant to the liberty of the subject in England.

Those who maintain they did, simply afford a striking illustration of the truth, that as liberty can only be secured by written Constitutions, *no written constitution can be adopted that men in power will not violate.* As said by Goevenecour Morris, December 22, '14, "What can a history of the Constitution avail * * * That instrument was written by the fingers that write this letter. * * * But after all what

does it signify that men should have a written Constitution, containing unequivocal provisions and limitations? * * * The idea of binding legislators by oaths is puerile. Having sworn to exercise the powers granted, according to the true intent and meaning, they will, when they feel a desire to go farther, *avoid the shame, if not the guilt, of perjury*, by swearing the true intent and meaning to be, according to their comprehension, that which suits their purpose."

Gouverneur Morris.

To Thomas Pickering."

2 Elliott's Debates.

Mr. Hallam is conceded to have been the greatest Constitutional writer of the English speaking race. In the second volume of his work he dwells at length upon the raising of the regular army and the militia; corresponding to our State militia. That those who held lands by military tenure were bound to attend the King with their vassals, or slaves, to repel invasion; but that this service was limited for forty days. The Court says in the Avers case, "In England it is certain that before the Norman conquest the duty of the great militant body of the citizens was recognized and enforceable Blackstone Book I. c. 13."

Now if this is true it is of no significance any more than if the learned Chief Justice had stated that at the time of the discovery of America the natives practiced Conscription. The question was: Was

Conscription legal in modern times in England? But Mr. Hallam, in speaking of what was formerly the custom as to Conscription through the prerogative of the King says:

“It is a question scarcely to be answered, since knowing so imperfectly the boundaries of Constitutional law in that period we have little to guide us but precedent, and precedent in such times is apt to be much more records of power than of right.”

In ancient times the Kings through alleged prerogative attempted to enforce Conscription. This was always resisted by Parliament, as an arbitrary exercise of power and contrary to the principles of English freedom. Now to the proof. Speaking of these ancient levies by the King, Hallam says:

“But there were levies, being of course, vexations to the people, *and contrary to their immunities* under the very shadow of the great charter they were entitled to enjoy.”

We see here that this great Author declares that these Conscriptions were vexations to the people and were “contrary to their immunities” under the great Magna Charta. And yet we find in 1918, the Supreme Court of the United States, citing these very invasions, by arbitrary power of the right of English *subjects* as an authorization of the Conscription of *American citizen under a free Constitution*. The thoughtful citizen will respectfully yet earnestly ask, if there is any name under Heaven given among men whereby they may preserve their

liberty, if such things can be done. This Author traces this long and interesting contest between the Kings seeking by arbitrary power to enforce Conscription and a brave Parliament (in striking contrast to the course of Congress, who as we shall see placed this power in the hands of the president) in attempting to prevent this illegal and despotic course. He speaks of the statute in the Reign of Edward III (1327-1377), by which Parliament solemnly declared that Conscription was illegal; just as an American patriotic Congress in the Lyons and other cases, declared that Sedition and Espionage Bills were illegal. He says:

“This statute put a stop for some years to these arbitrary Conscriptions.” But the despotic Tudor Kings broke over Constitutional restraint and invented subterfuges and evasions, as he shows, by which they attempted to set aside the Constitution of England, just as in the United States, at the present, inventions have been resorted to, history tortured to legalize Conscription. In speaking of this contest he says, that in the Fourth year of Henry IV (1403) Parliament passed a final Act preventing Conscription of which he says:

“The successful resistance thus made by Parliament appears to have produced the *discontinuance of compulsory levy for Foreign War.*” Thus, *ninety years before America was discovered*, Conscription for the Army came to an end in England. *That statute was the law in England when the Con-*

stitution was adopted and it remained the law of England until the present War in 1916. Yet according to the claim now put forth and decided Conscription always has been lawful in the United States since 1789, or since the Constitution went into effect.

The Court says:

"It is unnecessary to follow the long controversy between Crown and Parliament as to the branch of Government in which the power resided since there was never any doubt but that it somewhere resided."

Now English history is absolutely barren of any and all contests such as is set forth above. There was a long contest, not as to "the branch of Government" which should exercise Conscription, but between the King and Parliament—the latter attempting to prevent the illegal exercise of Conscription. It but confuses to add "That there never was any doubt but that it somewhere resided." For there is no limitation upon the powers of Parliament as to any matter whatever. It has been said it can do everything, except make a woman a man; and the limitation in this case, is physical not legal; and what good is there to cite this principle of the English Constitution.

But the fact is, from the year 1403 to 1916, a period of five hundred and thirteen years, Parliament never passed an Act Conscribing men into the Army. And the further fact is that though Parlia-

ment had the power it never exercised that power, for the simple reason, that Conscription was repugnant to the liberties of the English people and in violation of the great Charter itself.

Will some gentlemen, counsel or court, who wish to sustain Conscription law in the United States, produce authority to the contrary of the above.

And the statement of this present brief is sustained and borne out by the opinion in the Avers case that Parliament had the Constitutional power. The Court states: "This is exemplified by the present English service act," citing "The military Service Act January 27th, 1916, 5 and 6 George Fifth."

Now this is *the first and only Conscription Act ever passed* by an English Parliament. I challenge any other citation. And it is said that the sun never sets on the Dominion of England. She has carried on Wars of conquest almost continuously. Why did she rely upon bounties in all these wars, when her Parliament had the legal power of Conscription, as it had every other power unlimited. THERE IS BUT ONE ANSWER to the question and, that is there are certain great principles that are regarded as sacred in England, and among these, *that Conscription of the subject into the Army is contrary to the principles of English liberty.*

Then let it be asked, did our ancestors in forming a Government to secure the blessings of liberty, and unlike that of England founded on the consent of the governed, give as a mere incidental

power, a power regarded as despotic in England from whom they had withdrawn, in order to secure in a larger measure the blessings of liberty? Those who assert this proposition must contend that the Colonies withdrew in order to become free; and then the Colonies immediately adopted measures regarded as despotic in England. According to these gentlemen who thus libel the men of that age, they needed guardians, not new government.

Let another point be anticipated by the facts now being produced. The Court says: "As the mind cannot conceive of an Army without the men to compose it on the face of the Constitution, the objection that it does not give power to provide for such men, would seem to be too frivolous for further notice." "To provide for such men," it will be seen that the Court means to *provide for them by Conscription*, for the Court proceeds to say, in speaking of the objection that Conscription cannot exist, "But the premises of this proposition is so devoid of foundation that it leaves not even a shadow of ground upon which to base the conclusion."

Now let the Honorable Court, in view of these statements be asked: How did all the European nations, eternally engaged in war, raise their armies prior to 1798? How did England from the time that she abolished the despotic power of her King raise her armies and carry on war down to 1916? How did the United States down to 1863 carry on all of

their wars without Conscription, as I shall conclusively show from the record they did, if the power to raise an army cannot be conceived without the power to conscript the army?

The proposition of the learned Chief Justice is, that to raise armies *Conscription is necessary*. And this is boldly put forth though all armies prior to 1798 were raised without Conscription. The Court's authorities so show. Both reason and history disprove this claim. If a Republic exists it must be upon the consent of the Governed and the redeeming feature of a Republic, is that in war the people will rally to the support *of a just cause*. Mr. Wilson, in his message asking for a Continental army, said the American people had always done so. And another redeeming feature is, the people *will not* support an unjust war, or a war of conquest. And when a Conscription Act is passed in a Republic, and the people are thrust into prison, if they discuss it, then is incontestable proof furnished that those in *power know* the people will not *voluntarily maintain the war*. Conscription and Espionage Bills are to force the people to engage in war when they do not want war. And my old fashioned Democracy, teaches me that when people don't want war, they ought not be forced by power to have it. But to return to the English history. May's Constitutional History treats at length of this same matter. It may all be put in one quotation:

“Impressment of soldiers for wars was

formerly exercised as a part of the royal prerogative, but among the services rendered to liberty by the Long Parliament in its earlier councils, this custom was condemned except in cases of necessity, of the sudden coming in of strange enemies into the kingdom, or except in cases of persons otherwise bound by the tenure of their lands."

But he says the temptation was too strong in war and that some of the earlier English kings, by usurpation, still continued to exercise this power:

"But the class on whom it fell found little sympathy. *They were rogues and vagabonds, who were held better employed in defense of the country than in plunder. * * * It was a dangerous license, repugnant to the free spirit of our laws.*" (May, Vol. 2, page 260.)

It will be seen that this Author says that Conscription for the Navy continued. But he says it is a mode of imprisonment, instead of putting convicts in jails. And even as to this last he states:

"*Impressment has been condemned by the general sentiment of the country; and we may hope that modern statesmanship has at length provided for the efficiency of the fleet by measures consistent with liberty.*" (Vol. 2, page 263.)

Here this author says, that Conscription or "*impressment has been condemned by the general sentiment of the country.*"

The Court cites Blackstone's Commentaries as

to impressment before the Norman conquest. The author here deals with "The Military and Maritime State." Blackstone, of strong Tory leaning, wrote just before our Revolution. And he set forth *at great length all the lawful means* of raising an army in England. *And there is no mention of Conscription as a lawful means.* Yet the Supreme Court decides that it is a lawful means in the United States. And it is not claimed that the Constitution says in words that men may be conscripted into the army. But that in saying that an army may be raised, and that war may be declared, they gave as an incidental power the adoption of *a despotic measure*, and so regarded on the continent of Europe prior to 1798, and as despotic in England down to 1916.

And what is significant, Blackstone mentions as a means of raising a Navy *the impressment of convicts.*

Mr. Hume was a strong advocate of monarchy and of decided Tory leanings. I now quote this leading English history:

"The power of pressing, both for sea and land service, and obliging persons to accept any office, was another prerogative *totally incompatible with freedom.* The Government of England during that age (Elizabeth), however different in other particulars, *bore in this respect some resemblance to that of Turkey at present.*"

It will here be seen this Tory writer says that the prerogative of Conscription, "is totally incom-

patible with freedom." And further that under Elizabeth, who introduced Conscription, the Government of England "however different in other particulars, *bore in this respect some respects to that of Turkey.*" And yet we are told that this Conscription is lawful in the United States; and one reason given—and a good one when we look at the measure—is that Conscription is now lawful in Turkey. I shall show when we come to this bill that it *does not provide* for raising an Army *by Conscription*, but that it declares the army "shall be raised by *voluntary enlistment*, or, if, and whenever, *the President decides*, they cannot be effectually raised and maintained, *then by Selective Draft.*" (Sec. 2.)

So that not a single man has been drafted by authority of a law of Congress but by the orders of the President. That is to say, in ancient times a long contest went on in England, and finally in 1403 all power of Conscription was taken from the King. But in 1917, the Congress endeavored to put this power in the hands of the President. The clear words of the bill prove what is here said.

So it is asked again, did the framers of the Constitution adopt what was illegal in England.

SO-CALLED CONSCRIPTION IN THE UNITED STATES.

None ever existed, in the sense it is now used, down to 1863, and no prominent man ever claimed *the power was vested* in the United States.

CONSCRIPTION IN THE REVOLUTION.

There was none as now claimed. This whole matter has been misunderstood and erroneously stated. The States succeeded to all the powers of Parliament. And hence the States could have provided for Conscription to fill their quotas. It does no good to go into what States did, or omitted to do. We have here a dual Government. The States Governments have *all powers where not restrained*. The United States has no power *except where given*. Confusion on this subject runs throughout Mr. Davis' brief.

Armies were raised by bounties which constantly increased. "The bounty system was a child of the Revolution, called into being when the Colonies *denied Congress its power of compelling enlistment*. It grew steadily during the long struggle for independence, only to reach full maturity during the late Civil War." General Upton, p. 21. "As the war went on the difficulty of procuring recruits necessitated the payment of large bounties." (Upton page 40.)

And on the same page the author says, with a view of transferring the necessity to the several States. "Congress, March the 9th, repeated the resolution of January 23rd recommending the States to fill their quotas *by draft*."

We here have draft in the Revolution. And this is now claimed as an authority for the present law of seizing men and sending them to Europe.

The fact is Congress recommended to the States to divide all their non-combatant population into classes, and that each class was to furnish a soldier, and if the class did not hire a soldier and pay him, then the class was to be taxed a certain amount to pay the bounty and services of a soldier. Some of the States undertook to follow this plan, and some did not.

AND THIS IS THE WHOLE OF CONSCRIPTION IN THE WAR OF THE REVOLUTION.

I cannot reach the official record here, but the whole matter is set out in John Marshall's *Life of Washington*. The astute former Solicitor General, possibly through a clerk, has attached an appendix B to his brief. They are compilations of the Military Laws of the several States, which he calls "Draft Acts." The Court refers to these, and this will be noticed hereafter.

THE TRUTH OF THE MATTER STATED.

Bounties failed; so-called draft failed; Washington's pleadings failed. A little disorganized, starving army, defeated, driven from post to pillar at Valley Forge, proclaimed that the Revolution was a failure, and subjugation was inevitable. A handful was all that remained—as Lee's famished army, one pound of meat per week per man; one man to six feet on the earth works at Petersburg, proclaimed the failure of the Confederacy.

When lo! As if by magic a change came! *What was it?* Read this story as told by Marshall (afterwards Chief Justice) who was an eye witness. A German came, with a number of followers, expert soldiers. He himself was a great master of organization as McClellan or Jackson. These German soldiers under the direction of Baron Stuben, organized and drilled the army. Others soon joined, when no other measure could induce them. *An expert army came forth, which won American liberty.* From defeat they marched to victory, until the end at Yorktown. *America owes her freedom to these Germans, just as the North owes its success in the Civil War to the same people.* All this is history and at least may be told in Court, for whatever bearing it may have. The author carries no German blood, and little love because of the fact as a Southerner they came here to fight the battles against my section, with which they had nothing to do.

CONSCRIPTION IN THE WAR OF 1812.

Mr. Monroe, acting Secretary of War, submitted to Congress an elaborate report. He recommended a system which has been termed Conscription.

And another measure by voluntary enlistment. Mr. Troup of the military committee in the House reported the bill October 27th, 1814 (Vol. 3, p. 482) to carry out Mr. Monroe's draft. One clause divided "all the able bodied men into classes of——— each to furnish ————— or pay \$—C—— to hire

a certain number of soldiers; and if not furnished to be drafted out of these lots."

It got no further, and so far as the records go not a single man in the House supported the measure.

On the other hand, Mr. Giles of the Military Committee in the Senate introduced a bill for raising an army *by voluntary enlistment*. It promptly passed the Senate (Annals of Congress No. 3, p. 45). It had no opposition; and draft, so-called, *had no supporters*. The bill passed the House unanimously with a slight amendment as to bounties to minors (Vol. 3, p. 776); went back to the Senate, was immediately passed and approved by the President December 10, 1814. *This is the record which utterly refutes the claim of Conscription in the war of 1912.* And further an army *was raised*, and being raised, when the war ended.

CONSCRIPTION IN THE WAR BETWEEN THE STATES 1861-1865.

This was the first conscription in the United States bearing any resemblance to the present. Nothing need be said. The Constitution was suspended in nearly all its provisions, except they had no Espionage Bills even then. It was a civil war in our midst and was before the 13th and 14th amendments. Practically all democrats in and out of Congress opposed the measure as unconstitutional.

Let brief notice of the decision be made. It is said, "It may not be doubted that the very conception of a *just* Government, and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need, *and the right to compel it.* Vattel Law of Nations, book 3, pp. 1 and 2."

Who doubts the proposition that the object of a *just* Government is to protect the citizens, and that the citizen owes allegiance to his Government and a duty to render both civil and military service. But by attaching on to a correct proposition, a proposition not correct, anything can be proved. Vattel is the highest authority on the law of nations, but who goes to this author for the powers of Congress. Vattel states the first proposition, *which needed no statement*, because it is self-evident. But there is not a single word in the chapters in Vattel cited, *which squints even that there is a power to compel military service or Conscription.* And the fact is, when this French author wrote his greatest of all works, upon International Law, Conscription was not practiced *by a single civilized nation on earth*, nor claimed by any such nation *to be a lawful exercise of Governmental power.*

Continuing immediately the quotation above the Court says:

"To do more than state the proposition, is absolutely unnecessary in view of the practical illustration afforded by the almost universal legislation

to that effect *now in force.*" And then cites in the foot note the list of Governments where Conscription is now practiced. Remember the Court is speaking of what is termed "A just Government and its duty," and in the list of nations referred to in support of the proposition as a just measure, *there is not a single one that is not an absolute despotism.* This is true unless we except some so-called South American Republics as the Argentine Republic, Peru and Mexico, *which are worse despotisms than monarchies.* So that reduced to the last analysis and stated in plain words the Court's position it is as Conscription now exists in the absolute Governments of Europe and some South American countries with savages predominant, such as Peru, Mexico, and so on. Therefore the Convention of 1787 presided over by Washington gave the same power by the Constitution.

And the most complete answer to the legality of Conscription and Espionage Bills, is the fact, that they are demanded in this country as a necessary means of prosecuting the European war, and second, they can only be justified *by referring to the custom in such despotic despotisms as* are cited as examples by the astute Ex-Solicitor General, and in the opinion of the learned Chief Justice. Desperate indeed must be a cause; indefensible under the Constitution when it can only be justified by such contention. My eyes are dim and my principles are old fashioned, but with them I would say:

If Conscription was considered a lawful means in these despotic Governments, for that very reason it is unconstitutional in this once more perfect Union, founded upon the legal equality of man and where lawful powers arise from their consent.

There were numerous decisions during the Civil War on Conscription. They are absolutely worthless, except the case of *Borroughs v. Peyton*, 16 Gratton 470 and a case in Alabama which undertook to discuss the measure at length. I knew well the Judge in the first case and the defendant, Major Peyton. The first was as learned and able Judge as ever sat upon an American bench; but his decision is absolutely silly, because he undertook to discuss logically a power that was above the gifts of man. Perhaps I shall notice it hereafter.

THE MILITIA AND THE REGULAR ARMY.

The Ex-Solicitor says, "There is no doubt that the militia recognized in the Constitution is a State institution (46)" Again he says "The simple and obvious reply is that the *status of the citizen* is not merged in the militia; that the fact of an enrollment with the militia *does not exempt him* from other duties and liabilities of citizenship." These statements are absolutely true. (And let it be said in passing the defendant was convicted of Sedition for stating the same thing.)

Again he says, "The status of a citizen properly

drafted into the land forces is that of a soldier no less than one who has voluntarily enlisted." (p. 34.) I thank thee kind sir.

This is an exact statement of the law also. The militiaman is still a citizen. His duties are properly civil. And though noticed afterwards let it be said like all exceptional duties demanded by the State, *they are not "involuntary,"* but in pursuance of the original Social Compact or agreement by which the body politic is created. But the condition of the soldier is entirely changed. He is subject to no civil duties personally, and is responsible to the military law. See *Ex Parte Grimley*, 137 U. S. 147.

If this one fact is kept in mind, then it completely answers the brief and the opinion of the Court which seems to apply the principle of the one to the other. I shall show clearly, when I come to it, that enlistment in the militia, *does not* violate the thirteenth amendment, and that draft into the army *does violate* that amendment, unless Congresses, Presidents and Courts can abolish one amendment and make another.

And this for the clear reason the *status* of the militiaman is *not changed*, and the *status* of the soldier *is changed*.

NO APPORTIONMENT TO THE STATES SHOWS CONSCRIPTION AS A MEANS OF RAISING AN ARMY WAS EVER GIVEN.

This fact *completely demolishes* every single

claim for Conscription, and effectually demolishes every contention for it, to those who have any intelligent conception of the Constitution and its history.

As said Chief Justice Chase (*White v. Texas*) "One of the objects was to secure the States themselves." In fact the main object, as declared by the Preamble, was to create a more perfect union. This was to be done by securing *the absolute equality* of the States in the Union. Equal in all respects, based, in some cases, on population, and in others on the rule of uniformity.

They were to be equal on the *rule of uniformity* in the following respects:

First: Representation in the Senate;

Second: In the election of President, so far as each was to have two electors, corresponding to their Senators.

Third: Equal in the adoption of Amendments to the fundamental law.

Fourth: Equal in the passage of laws by the Senate. And also in the ratification of treaties, for in this matter, if a Senator voted one way and a Senator from the same State to the contrary, the vote of the State was simply nullified.

Fifth: Duties on imports were to be uniform. So was naturalization and bankruptcy.

Sixth: On the election of President, by the House, each State irrespective of its numbers had

one vote. Nevada, withonly fifty thousand, was equal with New York with practically ten million.

Seventh: The citizens of one State are entitled to immunities of citizens of the other States.

EQUALITY ON THE RULE OF APPORTIONMENT TO NUMBERS.

First: Representatives in the House are based on population of each State.

Second: So a part of the electors.

Third: Direct taxes are apportioned to the States, in all things—*until the present monstrosity destroyed this great principle as to income taxes, which was adopted on the demands of men of whom we may say "Forgive them Lord, for they know not what they do."* But for this monstrosity, we would have adopted the policy of our Fathers and kept out of this war; had neither Conscription nor Espionage Bills, and possibly the loss of liberty. For as said by Jefferson, direct taxes by the United States "*Is an infernal system, repugnant to a Federal Republic.*"

If we look at our magnificent system as it exists, the object was a union of equal States. If this fact is borne in mind, then *we know absolutely* that the patriots who framed that Constitution, *never gave the power of Conscription as a mere incident to the power to declare war and raise an army, without any provision whatever as to make this great*

burden fall equally upon the States, by either one or the other of the rules above.

Every man knows this to be true—and if he will not confess it then it should excite our pity, or upon the other hand, those feelings of horror which make argument equally uncalled for. The claim that Conscription was given as an incident, with no such guarantee or provision, is a slander upon the memory of the dead.

Washington warned us against a sectional party; so did Jefferson, and he said the Missouri compromise, which drew a sectional line legal and moral, sounded the death knell of the Union. It may yet prove true in the loss of all these principles, which the Union was designed to secure.

EQUALITY AND SOVEREIGNTY OF EACH STATE
ESTABLISHED BY THE REVOLUTION. WAS IT SURRENDERED BY THE ARMY CLAUSE?

Equality and Sovereignty was the great principle of the Revolution. Now those who support Conscription and an Espionage bill to prevent even its discussion, tell us this idea of equality was sacrificed, by an incidental power. That is an Army may be raised by Conscription, yet *no provision* whatever is made in the Constitution for apportioning the burdens to the States, who were to receive the benefits of the Army. And this claim is, in face of the fact that every other right, and every other

burden—some by comparison insignificant—are carefully apportioned to the States.

Every line of history; every provision of the Constitution, condemns the Conscription Act. And men are now in prison for protesting against this measure—found (and appropriately found) only in the despotisms of Europe and Asia by the Court's accurate statement.

If Conscription is valid in this Federal Republic of States, then an Army may be so raised in one section which will crush another. In fact it may be raised in one State, and the equality of the States, the central idea of the Constitution is destroyed. And the man who will claim, that all these other guarantees in the Constitution, securing the equality of rights and burdens, were inserted and that this power was put into the hands of Congress and the President, without any guarantees that man has little conception of our Constitution or its objects.

More than this, to be mentioned hereafter, this puts power in the hands of the President, *to destroy the Constitution of the United States, and make himself absolute.* And it therefore was never authorized by the Constitution. And the fact is, that the Governors and all other State officers, *of once Sovereign States are now BY ORDER OF THE PRESIDENT, PUT UNDER DIRECT COMMAND AND CONTROL OF THE PROVOST MARSHAL OF THE ARMY.* This puts the President in command of the States and the Army above them. *These are the plain facts.*

One of my ancestors, a distinguished officer of the Revolution, wore chains on the prison ship, to establish this liberty. And God be praised, I have inherited the principles and courage to raise my voice in protest, and to say, that every intelligent man, whatever his position, KNOWS that no such despotic power was given to the general Government. If he has not courage to say so is another thing.

THE THIRTEENTH AMENDMENT.

No measure ever written by man (and it was written by the man who never had an equal for clear expression) is cleared; and none involved in more doubt by immature and phantastic interpretation. Its object and scope is all plain. Yet through interpretation, the whole provision has been stricken down, except the first clause. It now reads by interpretation: "Slavery shall not exist in the United States." For the other clause—"involuntary servitude"—equally prohibited, only means that condition which is embraced in the first clause, and is in reality slavery. African slavery, as it once existed, is not the only form of slavery possible. He who seizes by force another, and compels him to labor for one hour, as clearly establishes *slavery* for the hour, as the white man who held by force the negro for life.

It is said the last clause applies to Mexican

peonage and like conditions. In answer to that, it may be said, that such conditions are covered by the first clause. Second, that no such condition existed in 1784 to be guarded against, when Mr. Jefferson wrote the Northwest Ordinance and by this interpretation his great intellect provided against a condition no one could then anticipate.

It is well to get back to first principles. *We must do this if construction is not to destroy Constitution.*

The amendment prohibits two things.

As interpreted, it need have prohibited but one. First: "Slavery" is prohibited. Second: "Involuntary Servitude" is also prohibited.

Now Mr. Jefferson in his whole life never was guilty of the inaccuracy of expression of using both these terms, when the last, as interpreted by the Courts only means what is embraced in the first term. In his entire writings, through which this author has been educated, I have never found *but one* inaccuracy of statement. This is, he says, "Whigs and Torys exist by nature and are found in all lands by whatever name called." Now Whigs exist by the law of Nature, that is, as God created men equal in rights; while Torys *exist against the law of Nature.*

But by the interpretation given to the Thirteenth Amendment as written, *it is absurd and ridiculous.* It reminds me of Calhoun, who through

his giant intellect, completely demolishes by an argument, which is unanswerable, one Number of the Federalist, written by Mr. Madison. We know that Madison was perhaps the most profound Constitutional lawyer America ever produced. But he was a silly dotard, according to Mr. Calhoun's analysis. But the simple fact is Calhoun had become so enamoured with the indefensible doctrine of Nullification, that he did not understand what Madison wrote. So in writing this clause of the Northwest ordinance, Jefferson wrote *a very silly and a very foolish thing*, if in modern times, what he wrote has been correctly interpreted by Courts and some others.

TRUE MEANING OF THE THIRTEENTH AMENDMENT.

It abolishes slavery. Not only African slavery, but *slavery in every possible form.*

Second: It abolished every single form of "Involuntary Servitude" whether imposed by an individual or the Government. In a word, it was intended to put in concrete form that in a Republic the statement of the Declaration of Independence, "That Governments are founded on the consent of the Government" should be a living vital fact.

These decisions say, that what *they term* "Exceptional services" are not prohibited by the Amendment. Mr. Jefferson understood perfectly well—for it is the basis of the Declaration of Inde-

pendence—that our State Governments, are all founded on the *Social Compact*, where by agreement, the people found a State or Body-Politic. And that the civil duties arising out of and by this, could never be construed as “INVOLUNTARY.”

So those Courts, who speak of these civil duties as being exceptional, are simply talking nonsense, about something which the clear intellect of Mr. Jefferson understood was not prohibited by the Amendment.

IS CONSCRIPTION VALID UNDER THE AMENDMENT?

To determine this question, we must take the Amendment *exactly as it exists*. In nearly every decision, the Courts *have not done this*, but have passed on an entirely *different Amendment*. The Amendment does not say merely “NEITHER SLAVERY NOR INVOLUNTARY SERVITUDE SHALL EXIST,” *and there stop*. If it did, there might be a logical deduction, that certain matters, or exceptional duties, civil and military, were not embraced or prohibited by the Amendment. It might be said that this, that, or the other, was indispensable to Government, and were, therefore, not prohibited by the general words. But the Amendment declares, that this general condition shall not exist in the United States, “EXCEPT IN THE PUNISHMENT OF CRIME, whereof the parties shall have been duly convicted.” *What then is the*

rule of interpretation to be applied to the entire clause as it stands. There is a universal rule that must be applied. Congress in submitting this Amendment and the States in adopting it, *were well aware of that rule, and must be conclusively presumed to have adopted it with that knowledge.*

It is that when general words are followed by special words, *making an exception to the general words*, NO OTHER EXCEPTION CAN BE MADE. This is known as the rule of "*Exclusio unis, exclusio alterius.*"

As interpreted by a leading writer it means: "Express mention of one act, condition, etc., excludes others not mentioned." (Broom's Legal Maxims, 651-664.)

This rule is known and *affirmed by every Court in America*, and expressly by the Supreme Court of the United States.

United States v. Don Fernando, Arredondo
9th Peter's 691;

Raleigh R. R. v. Reid, 13 Wall 269;

Sterens v. Smith, 10 Wall 321;

Thomas v R. R., 101 U. S. 71-82;

Kendall v. U. S., 107 U. S. 123.

By way of illustration If the Amendment had only contained the general prohibition without any exception, it might be argued with force that neither the States or the United States, could exist without the power to punish those who violated their criminal law. *If anything is* "Exceptional" and

excepted out of the general clause, *it is this power to punish criminals.*

But Congress said in submitting the Amendment, and the States said in ratifying, *that this power of punishing criminals*, would not exist *but for* an express exception. If this is not true, *why was the exception put in.* If exceptional duties are not prohibited, if they do impose "Involuntary Servitude," then **THE EXCEPTION IS MEANINGLESS AND HAS NO FORCE WHATEVER.** Because to punish criminals is indispensable and if all exceptional duties and powers are excepted from the prohibition of the Amendment; then there is no reason in expressly excepting, by name, the most important. But being so excepted is a positive declaration by the Amendment all other exceptional powers and duties are prohibited by the General clause.

And it is a universal rule of construction, especially of Constitutions, that *not only every clause, but every word* must be given a meaning. And next, that if any construction *destroys any clause, then that construction cannot be given.* Will any Court deny any of these two propositions? And yet by the construction applied to this Amendment, in cutting out of the prohibition whatever, this Court or that Court, composed of fallible men, *think should be excluded*, the entire Amendment has been stricken down and rendered nugatory as construed to nothing but "Slavery is prohibited;" or con-

ditions that would be embraced in that term.

And the first clause is also stricken down, for public sentiment at the present day is more powerful than any amendment; and in the absence of any prohibition, it is safe to affirm that African slavery could not exist at present in any of the States. We see this immature species of reasoning in a great case and by a great Judge. I refer to *Robertson v. Baldwin*, 165 U. S. 275, by Justice Brown. The Court there held, and correctly, that a seaman *who voluntarily enlisted*, could not afterwards, when he wanted to quit, claim that his services were "Involuntary." The Court says, in speaking of these exceptional services: "That there are exceptions, *where in that case IS THE LINE.*"

Now we submit, with all due respect to the memory of the great Justice, and to other distinguished jurists, who have used similar expressions, that this is not only sophomoric, but it downright destructive. This Government, unlike every other, is a Government of law. That law is the Constitution; and that Constitution *is the supreme law*. Congress, in the exercise of a special Constitutional power, submitted an Amendment. *The States* (I prefer to say in their *Sovereign capacity*—for the making of a Constitution is the very highest attribute of Sovereignty and belongs alone to Sovereignty) have ratified that Constitution, and thereby made it the SUPREME LAW. *In this country who has power, except by another Amendment to lawfully change it?*

And when, as said by this Court in numerous cases, this Amendment denounces "A status," and that status is first "slavery" and next "Involuntary Servitude;" and when the Sovereignty has said to all persons, the agents especially (including Congresses, Presidents and Supreme Courts), that to this general status, *there shall exist one certain exception*; where does Congress and the Executive, the Supreme Court, or any other power get the authority to add other exceptions, *because they think that other exceptions ought to be made*.

In other words, when the Constitution in the only exception made, *has drawn the line* between the lawless and the law abiding, *what power but the Sovereign people, in regular form, can draw it anywhere else*. What does it matter, that the Members of the Supreme Court think *it ought to be drawn somewhere else*. They must first show *their power to draw it elsewhere*, before they can do it by construction. For construction, as pointed out in other cases, notably by that great and patriotic Judge, Mr. Justice Harlan *is usurpation*. Answering the destructive inquiry of Justice Brown—"Where in that case is the line?" We say the distinguished Justice answers his inquiry in these words:

"We know of no better answer to make than to say that services which have from time immemorial been treated as exceptional, shall not be regarded as within its purview." This would have

been a good suggestion perhaps when the Amendment was pending, by adding it as an exception. But it was not *added by Congress and the States* and *cannot lawfully be added by any other power*. But if other exceptions can be added by the Court, others might think that it should be drawn by judicial determination between the rich and the poor. Others between the laboring classes and the employers. Others again, between white and black, as was once the case. Others might say with Aristotle: "Some are born to rule and some to be ruled." Therefore, let the line be drawn between those born to rule and those on the other hand born to be ruled. Just create a Court with one of these views and you have a Constitution in that form. The truth is, that under this rule of interpretation the Amendment is destroyed, but further, it launches us into a boundless sea of construction. *It means nothing more than what Congresses, Presidents and Courts think it ought to mean*. And there you have the Thirteenth Amendment BY CONSTRUCTION.

The meaning of the Thirteenth Amendment is plain and must be considered *first* as it applies to the States severally; and *second*, as it applies to the United States.

AS TO THE STATES.

The first exists by virtue of the Social Compact between the people composing it. It is un-

necessary to go into a discussion of this matter. It is conceded by all who believe in Republican Government. It is now conceded, however once denied by all the advocates of monarchy. This idea was never better expressed than in the great Bill of Rights of Massachusetts, as drawn by Samuel Adams. It declares, "The people inhabiting the territory formerly called the Province of Massachusetts Bay, do hereby solemnly and mutually agree with each other, to form themselves into a Free, Sovereign and Independent body-politic, by the name of the Commonwealth of Massachusetts."

"The body-politic is formed by a voluntary association of individuals. It is a Social Compact by which the whole people covenant with each citizen, and each citizen with the whole people, that they will be governed by certain laws for the common good."

It is afterwards explained that afterwards the people, thus united, agree on a Constitution for the body-politic by a majority vote. *Here is the true and only foundation for our States.*

So that as to States, it is useless to talk about "exceptional duties." These duties called exceptional, *are contractual duties* by the people in founding a State by the Social Compact. Mr. Davis cites many instances of what he calls exceptional duties. On entering the militia, the *status* of the citizen *is not changed*. He is still a citizen, performing properly civil duties. The case of a juror, comes

under the same head. He cites the case of an attorney who must defend an accused person without compensation on appointment of the Court. In addition the State confers a license and a special privilege upon him, *and attaches a condition*, that he must perform this service. He accepts the license and he accepts it *on the condition*. And so we can go through the whole list, are only agreements in forming the State.

The Amendment only applies to "*involuntary servitude*." If the employment was conceded to be "*Servitude*" it is not "*involuntary*," because in pursuance of a contract. This is illustrated by the case of *Robertson v. Baldwin*, 156th U. S. 275.

In that case the sailor contracted. The Court simply held the services were not "*involuntary servitude*" because he wanted to violate his contract afterwards. One of our troubles is that our Government is gradually slipping away, because we reject, or do not understand, fundamental principles. A point by way of illustration may be mentioned. Courts constantly talk loosely about "*The inherent powers of Courts*." There is no such thing in a Republic as INHERENT powers, in any branch of Government. This theory applies to monarchy. But in a Republic whether a single, or a complex Federal Republic, all powers are DELEGATED. If a Court to preserve order punishes anyone who disturbs its proceedings; if in the absence of a statute, it makes rules as to pleadings, issuing subpoenas or issuing

executions, it does so by INCIDENTAL OR IMPLIED power. For power being granted *to hear and determine a cause, power is granted, as an incident, to do everything necessary and proper to the main end.*

THE THIRTEENTH AMENDMENT AS TO THE FEDERAL GOVERNMENT.

The name implies the nature of the Government. It is a Republic of Republics. A joining together of certain political bodies for certain definite purposes, by a Constitution. Mr. Webster thought there was great conflict between a Federal or Confederate Government (for they mean the same, though Mr. Wilson says not), and a Supreme Law. *But how can a Federal Union, or Confederation, exist without a Constitution creating it; and how can a Constitution exist unless it is a Supreme Law?*

When we come to this Complex or Compound form. (Federalist) we must go to its Constitution *alone* to determine its powers. Mr. Justice Day, pertinately and correctly said in *Door v. the United States*, 195 U. S. 138:

"It may be regarded as settled that the Constitution of the United States, is the only source of power authorizing action by any branch of Federal Government." (Page 140.)

If this had been adhered to it would have saved

much trouble. And if adhered to, our Union, and its true principles, would live forever.

The above quotation is very simple, *yet a very great and true statement*. It is the beginning and the end of all constitutional authority—where is the power in any instance? For instance and by way of giving illustration take the case of *Chisholm v. Georgia*, 2nd Dallas ———. The question there was, could a citizen sue a State? The court had only to turn to the Constitution, and there was the power, so plain as not to be mistaken, although it seemed to have escaped everyone, except Patrick Henry and George Mason. All the Judges *wandered over creation*, to every country, and to every period. They discussed almost every conceivable question when there were but two. First, that a State *could not be sued without its consent* and second, the States *had agreed* in the Constitution *to be sued*.

And it is so as to this Thirteenth Amendment. For instance, when the Constitution created the Supreme Court, and authorized Congress to create inferior tribunals and vested judicial power, it gave *as an incident* to that power, the right to summons witnesses; to compel the attendance of jurors. It was *an incident* to the main power. And while the attendance may be “involuntary” it is not in any sense “servitude” but meeting a civil duty by the citizen, which he in turn has a right to demand of

every other citizen. So in all the other "exceptional cases"—*they are purely imaginary.*

THEY ARE NOT EXCEPTIONS to the Amendment; *they are not embraced within its terms,* because they lack essential elements to bring them within the purview of the Amendment. To violate that Amendment, two things must occur: First, it must be "INVOLUNTARY;" second, it must be "SERVITUDE."

Now when we come to drafting an Army, as properly said, by our present Minister to England, *the status of the individual is changed.* He was a citizen. *He becomes by the draft a soldier and subject to military law;* and he loses many of the rights which pertain to the citizen. In a word, *his whole status is changed,* for as said by that pure and upright Judge, Mr. Justice Brewer, he is likened to the man, who enters into marriage, by which he assumes *new relations, new duties and new responsibilities.*

That draft is "*involuntary*" no one questions. The very bill itself so concedes it to be. It provides two modes—"voluntary enlistment" and "selective draft." That thus taken, his employment is "servitude" no one questions. A certain Judge ranted about insulting our noble soldiers by calling them slaves. No one claimed that a soldier *was a slave,* although we learn that Conscription into the Navy of England, was confined to vassals and slaves. Webster in defining the word "servitude" gives as

one definition: "Involuntary—Contrary "Servitude: A state of subjection to a master or to arbitrary power of any kind; 4 *service in the Army or Navy.*" So that to conclude this branch. When a man is drafted he lays aside his citizen clothes. And when he puts on a uniform he becomes a soldier, subject to both *Martial and Military Law*. He is taken, by force from his farm, counter, office, placed in the ranks; transported across the sea, perhaps to die in a Foreign Land.

When the younger Pitt forgot the principles of his illustrious Father and introduced some extreme measures, that great patriot, Charles Fox, arraigned his conduct severely. He said, "Why not be frank and honest and say frankly that a free Constitution is *unfitted to the country.*" Let us be frank, and say at once, when we undertake to maintain such transparent contradictions and fallacies, that drafting the citizen into the Army is not "*Involuntary servitude,*" that a free Constitution is no longer fitted to us. Let us manfully look things in the face, instead of resorting to such evasion, which may fool those of little information, every candid and intelligent man knows to be unfounded.

Said Montesquieu about his perplexity in the twenty years he was writing his Spirit of Laws "But when I once discovered *first principles* everything I sought appeared." *First principles* are above stated, and with these to guide, all the mists and doubts thrown around the 13th Amendment, by

which the clause "involuntary servitude" is expunged, and nothing but the prohibition of "Slavery" remains, *disappears*. As written by Jefferson it means *that cannot be done* which Conscription *does*. It left the citizen in a Republic free to fight or not; knowing full well, if worthy, they would *defend* their Republic and they could not be forced to fight in an aggressive war; which is the effective means, *not to preserve, but to destroy* a Republic. And when a people are worthy they will preserve a free Government founded on their consent; and they will defend it in war. But they will not freely fight to "Carry Democracy to Europe" *and the Conscription and Espionage Bills are a confession they will not.*

And this is all—the alpha and omega—of this whole matter.

EVERY CLAUSE OF THE CONSTITUTION IS EQUALLY BINDING AND THE SUPREME LAW. THEREFORE, IN THE EXECUTION OF ONE POWER, ANOTHER CLAUSE CANNOT BE VIOLATED. THE ARMY BILL VIOLATES THIS RULE.

"No person shall be deprived of life, liberty or property, without due process of law." Const. U. S., Amendment V.

Conscription is not valid because it violates the above Article. In raising an Army, the citizen cannot be deprived "of liberty or property without due process of law." This is a view that has been lost

sight of in the discussion of the validity of Conscription, when it is held to be legal, because legal in countries where no such guarantee exists.

First: Conscription deprives the citizen of both liberty and property; and may deprive him of life. He is taken by force; transferred from a citizen to a soldier, and his *status* changed. He loses many rights as a civilian, and is subjected to a different law as a soldier. It takes him from shop, store, office and field, and thus it deprives him of property. As a direct result, it may deprive him of "life."

Second: "Due process of law," consists solely of a hearing in a duly constituted tribunal, which is authorized "to hear, consider and determine."

Conscription under the mode provided, is not "due process."

Third: It is, therefore, unconstitutional.

Let this be demonstrated. The United States, with the assent of the State, may acquire land for the purpose of building forts, arsenals, postoffices and other public buildings. Under this power, if the Government cannot agree with the owner, it may condemn these sites. To do so, it must go in the proper Court and institute legal proceedings; and there must be a regular trial.

This is true under the clause just quoted and would be equally true in the absence of the last clause of the same Article as to "just compensation." Now it must be remembered, in arriving at

a correct solution, that the *same clause*, which declares that no one shall be "deprived of life or property, without due process of law," also puts "liberty" on the same footing and under the same Constitutional protection.

From these conclusions above, it is submitted, that there is no possible escape.

We now go to this particular Army Bill, to show that it is void, *even if Conscription is valid.*

THE SOLE POWER OF RAISING AND SUPPORTING ARMIES IS VESTED IN CONGRESS.

THE ACT UNDERTAKES TO VEST IN THE PRESIDENT THE POWERS THAT THE CONSTITUTION VESTS IN CONGRESS.

It is a fair and accurate summary of this Bill to say, it might be put in these words:

"The President is hereby authorized and empowered to raise an Army of such numbers, kinds and organizations as he deems proper; provided it shall consist of men between the ages of 18 and 45."

It is supposed that no one would question that an Act of the above kind would be a nullity. I now proceed to show, *and that conclusively*, it is believed, by the terms of the Bill, that such are in effect its provisions. In brief, that the power, which the Constitution *vests in Congress* the Bill undertakes to

rest in the President. If this is shown, then both the old and new Army Bill or Conscription Act is void—*unless the powers delegated to Congress, may be delegated by Congress to the President.* It is said that this Bill was written by General Crowder, the Provost Marshal, passed by him to the President, and is just such an Act as an Army officer would devise.

1st. "Be it enacted * * * the President be, and he is hereby authorized,

FIRST. Immediately to raise, organize and officer and equip *all, or such number* of the increments of the regular army, provided by the Defense Act approved June 3d, 1916, *or such parts thereof as he may deem necessary.*" Section I.

"To raise an Army" implies discretion; this is vested in the Legislative and not the Executive branch. But here the President is authorized to "organize and officer and equip *all or such number,*" of the increments provided by the Defense Act, "*or such parts thereof as he may deem necessary.*" Under this he may raise *all* or he may raise *none.* And if this is not "raising an army," which is vested in Congress, then there can be no such thing as raising an army by an Act of Congress.

2nd. "The President is authorized to *increase or decrease* the number of the organizations prescribed for the typical brigades." Sec. 1, Par. 3.

What the increase, what the decrease, is not provided. The President decides this.

Here the President in his discretion may on the one hand "*increase*"; or on the other hand "*decrease* the number" or certain organizations; or further, he may allow them *to remain* as they then were under the law. Here the President is authorized *to suspend* an Act of Congress in his discretion and to raise in its place a greater or less number of organizations than that law requires.

Next:

3d. "FOURTH. The President is further authorized, *in his discretion and at such times as he may determine*, to raise and begin training of an additional force of 500,000 organized, officered and equipped as provided for the force first mentioned in the preceding paragraph of this section." (Sec. I. paragraph 4.)

Some things are so plain that attempted exposition only confuses. It is so here. *This is an enormous army: 500,000.* The President is authorized, first, "to raise it"; second, "not to raise it"; not upon the discretion of Congress that it is necessary, but upon his own discretion; that is, to determine if the United States needs 500,000 additional army. No one can question that *if Congress decides that this army is necessary*, Congress can authorize and provide that it be raised and how raised. *But Congress does not decide anything.* It authorizes the President both *to decide and act*. "The President

is further authorized, in his discretion, and at such time as he may determine," is the provision.

This provision virtually says the President is authorized to raise this army, if *he desires to do so*. If it is necessary and should be raised *is the very power vested, by the Constitution, in Congress*.

Next, Congress does not declare *that the armies shall be raised by Conscription*. It simply declares that the President may *declare that the army shall be raised in that way*.

4th. "That the enlisted men required to raise * * * shall be raised by *voluntary* enlistment, or if, and whenever, the President decides that they cannot be effectually raised or maintained, then by *Selective Draft*." (Sec. 2.)

On this I make a few remarks, though none are absolutely necessary. Is Conscription valid? *If so, Congress provides for raising the Armies by Conscription*. The *Ayers case* so decides. If this power exists, it rests on the calm judgment of both Houses of Congress. That is, *Congress* looking over conditions, *decides* that it is necessary to raise an Army *by Conscription*, and *so provides by law*. But in this case, *Congress does nothing of the kind*. It had all the facts and was required *then to determine if Conscription was necessary*. But it does nothing of the kind. It provides that the armies shall be raised by "voluntary enlistment"; "or if, and whenever, the President decides," that they cannot be so raised, then "by *Selective Draft*."

And as demonstrating that this Bill is invalid, Congress who were required under the Constitution to have all the information, and as the Legislative body to decide, *passes the decision on to the President*, WHO IMMEDIATELY DECIDES THAT CONSCRIPTION IS NECESSARY.

Let the Court and others stop now and think seriously and dispassionately. Several million of men have been drafted and large numbers transported to Europe. Think of all the turmoil and vast machinery employed in this Conscription. Think of the prosecutions under the Espionage Act on allegations that Conscription has been impeded.

Then ask: WHO ORDERED CONSCRIPTION? If valid, *who has the power to order Conscription?* THE ANSWER IS CONGRESS AND CONGRESS ALONE. But Congress did not determine on Conscription; *the President did this*. And to demonstrate this matter, if demonstration is necessary after this statement, IF MR. WILSON HAD NOT ORDERED CONSCRIPTION, as a means of raising an Army, then there would have been no prosecutions under the Espionage Act for impeding Conscription. *Then there would have been no army raised by Conscription or transported abroad.*

These provisions take this Army Bill out of the realm of discussion. And it would be a reflection upon Members of Congress, to suppose that they

read General Crowder's Bill; as it certainly is a reflection to suppose that they did not.

5th. "That the President is authorized to raise and maintain by voluntary enlistment, or draft, as herein provided, special and technical troops *as he may deem necessary* and to embody them in organizations and to officer them, as prescribed in the third paragraph of Section 1 and Section 9 of this Act."

The President is given, in the above clause, power to raise armies without any limit whatsoever. Not only so; he is given power to say whether or not the citizen can be forcibly seized.

"What army is deemed necessary" Congress alone must determine. There is here no specific force or army declared to be necessary by Congress. But, in few words, the President is given unlimited power to raise an army or armies, at his discretion; or, as said in the Act as he "*deems necessary*"; that is, *by draft or by volunteers*.

That is to say, the President determines *the number*; and *the mode* in which they shall be raised, *whether by Draft or by Voluntary Enlistment*.

6th. "That the President is hereby authorized to discharge any Officer from any office held by him under such appointment (i. e., in the Army), *for any causes which in the judgment of the President, would promote the Public Service.*" Section 9.

Here is absolute power. It cannot, in any free

country, in Civil or Military matters, be vested in one man.

God alone is fit for its exercise, because His Goodness and Justice are as Perfect as His Knowledge is Infinite.

Such an Army, so organized, is dangerous above all others. *Its Loyalty is to the President, and not to the Country.* It unites in the Commander of the Army, Supreme Legislative Power. He decides, without Law, what will promote the Public Service, as Judge, and then executes his own Law.

Let it be said in addition to the above *that heretofore* a soldier *had some vested rights.* When by long and distinguished service, such for instance, as that of General Wood, he has attained a rank; he cannot be discharged *by the mere order* of the President. Charges must be preferred, and he can then only be discharged as a punishment, on a verdict of guilty on a regular trial. But here the President can discharge any officer "*for any cause which, in the judgment of the President, would promote the public service.*" What are offenses under the civil law? These are defined by the law itself.

What are offenses under military law?

These are also defined by law.

But under this Army Bill every army officer, from the lowest to the highest, holds his position *by the simple tenure of the President's will.* It is no exaggeration to say that such an army, so organized, will owe its loyalty to the President. Should

we then feel surprised that the President has jumped an officer of inferior rank, over the head of his superiors? Such an army, so organized, is unfitted to a Republic. And we should not feel surprised that it should have as a companion Conscription by the order of the President, and an Espionage Bill, enforced by some of the inferior Courts in such a manner, as would cause envy on the part of a Turkish Pashaw.

So in conclusion, it has been demonstrated by the provisions of the Bill quoted (and there are others) *that the powers of Congress have been delegated to the President. That this Bill correctly analyzed, amounts simply to a declaration that the President shall have power to raise armies in such numbers, such organizations, and by such methods—whether voluntarily or by draft—as he shall determine, with the one limitation as to age.*

It was said in the Federalist when the Constitution was pending, in speaking of the dangers of a standing army, that a stranger to the plan would suppose that the President was authorized to raise armies. But an examination would show “that the sole power to raise armies was vested in Congress.” And that Congress was limited by that provision, which provided that appropriations for the army should only be for two years.

The object of this last provision was, that the people by the election of the new House, might correct any abuse of the power, BUT NOW THE

ESPIONAGE BILL FORBIDS THE DISCUSSION OF ANY ABUSE. It is the duty of every law-abiding citizen to discuss this feature, which strikes at the very foundation of the Constitution. But if he performs this patriotic duty he is sent to prison. Let there be no evasion; LET THE COURT SAY WHETHER AN ESPIONAGE BILL, TAKING FROM THE PEOPLE THE RIGHT OF DISCUSSING SUCH AN ARMY BILL, IS CONSTITUTIONAL.

A greater question never arose in a human Court.

CONGRESS ALONE HAS POWER TO CREATE "TRIBUNALS" INFERIOR TO THE SUPREME COURT.

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as Congress may, from time to time ordain and establish." (Art. 3.)

"The Congress shall have power—To constitute tribunals inferior to Supreme Courts." (Art. 1, Sec. 8.)

These provisions are so plain as not to call for citation of authority. A few however, are cited.

"Congress has power to establish such inferior tribunals as it sees proper." *Stuart v. Laird*, 1 Cranch 299.

"That Congress has power to establish Circuit and District Courts in any of all of the States—It

falls within the express words of the Constitution.”
(*Livingston v. Story*, 9 Peters 632-656.)

“District Courts are solely the creature of statute.” Justice Brown in *McDowell v. U. S.*, 159 U. S. 596-598)

The power to create inferior Courts, is in Congress. By Justice Day, *Dorr v. U. S.*, 195 U. S., 138.

And it has been held by the Supreme Court (reference not at hand) that the *President* cannot create tribunals with powers over *the rights of citizens* even in Foreign Territory.

If space permitted, it would be instructive to trace this clause in the Constitution. Twice did the Convention refuse to give this power. Appeals were to be from the highest State Courts to one Supreme Court in certain cases. This was in harmony with the general plan; for that did not provide for “inferior” Congresses, or Executives. But Mr. Madison, noted for his persistency, held on, and finally secured this provision, upon the distinct understanding that it would never be employed, except necessity where citizens of another State were discriminated against in the Domestic Courts, or for other causes.

The Bill *admits the necessity of a tribunal and hearing*. It then violates the above provision, by vesting THE POWER TO CREATE THE TRIBUNAL IN THE PRESIDENT. The language of

the Act is there "*shall be created, under the direction of the President, local tribunals.*" It is not said "*There is hereby created local tribunals,*" in exercise of the Constitutional power. But if the Act is examined, it will be seen that it undertakes to authorize the President TO CREATE the tribunal in which the citizen is to have a hearing. It goes further, and authorizes THE PRESIDENT TO CREATE both inferior and appellate tribunals. The sole lawful power is in Congress *to create* these Courts, and then in the President, to appoint the Judges or Officers, by the advice and consent of the Senate.

But this Bill admits by its terms that there must be a tribunal before which the citizen can have a hearing; and it then undertakes to empower the President to create that tribunal, *without asking the consent of anyone else.*

No more important question could be submitted to any tribunal. Before it the citizen is to go. On its determination, he is to remain at home a citizen, or he is to be taken from father, mother, wife and children. He is gone perhaps *forever*—and his body, it may be, to rest in an unknown grave and on a Foreign soil. And yet *the tribunal created to decide this great question for all*, is CREATED by the President; and those composing the tribunal are also appointed by him, without the concurrence of the Senate.

If this can be done in a Constitutional Govern-

ment it is idle—worse than idle—to talk about the Constitution.

How does the Court meet this suggestion in the *Avers Case*?

The Court says the Statute is not void as vesting administrative offices with judicial function (citing cases). The Court then proceeds: "Like conclusion also adversely disposes of a similar claim concerning the conferring of Judicial Power." Citing:

Butterfield v. Stranahan, 192 U. S., 470;
West v. Hitchcock, 205 U. S., 80;
Ocean Navigation Co. v. Stranahan, 214 U.
 S., 320, 338, 340;
Zakonaite v. Wolf, 226 U. S., 272, 275.

The First case relates to power of officers to pass on the imports of tea and determine if they come up to the requirements. The second relates to the claim of an Indian to allotment of land by the officers of the land office.

It may be owing to lack of ability but this Author is unable to see the relation of these cases to the question being discussed. The third (214 U. S.) relates to the right of a foreigner to enter the United States and the power of Port Officers or Inspectors to decide on his qualification. The fourth (226 U. S., 272) relates to a foreign female sought to be exported because she had violated the condition from which she had been admitted and had become a professional lewd woman.

The two first cases were mainly ministerial and necessarily so. But whatever their character the tribunals were created by Congress, and not the President. The persons involved in the last case, as has been explained, *had no vested rights whatever*. But the "tribunal" even which here passed upon the questions involved, were "created" by Congress under its powers, and not by the President.

Here is a frank admission that the best reason that a learned Court can give for the legality of "a tribunal" created by the President, to pass on the greatest rights of a citizen, whose status is about to be changed are the cases above. One being the right of a Chinese bawd to remain in the United States. Certainly if an Act of Congress, deeply affecting the rights of an American citizen—a case in which he will be deprived of both "liberty and property" and may be deprived "of life" must depend upon such cases, may it not be asked, if this does not clearly demonstrate that an Act of Congress, which can only thus be sustained, is not "in pursuance of the Constitution."

We thus see that the Court relies, in some of the cases cited, upon the proposition that certain officers pass upon the qualification of foreigners to enter the United States. Congress might, *without violating any constitutional provision*, vest this power in even an Army officer, or one of the Navy. The foreigner *has no rights whatever* to enter the United

States. But *a citizen has rights* and these rights are or were protected by the Constitution.

"The Sovereign may *forbid* the entrance of his territory, either to foreigners in general or in particular cases." Vattel Book, 2 Ch., 7 Sec. 96.

"Or annex what conditions he pleases." (Vattel Book 2, Ch. 8, Sec. 100.)

This very authority was in an early case cited and the principle approved by the Supreme Court. It is well established. Now, *to sustain the bill* against the objection now being urged, the Court is under the necessity of placing the citizen, with Constitutional rights on a level with the foreigner who has no Constitutional rights. But it goes even further, for if counsel is not mistaken "the tribunals" which pass upon the admission of the foreigner, are "*created*," not by the President, but by Congress. So that on the question: **IS THIS BILL VALID**, the citizen must be reduced to the level of the Chinese coolie seeking admission—nay even lower. For the tribunal that passes upon the admission of a foreigner, is created by Congress; and those that pass upon a citizen are created by the President. And it is *the highest evidence* that can be produced in any case, showing the Act unconstitutional, is this position, though necessary to sustain the bill.

Even the Virginia and Kentucky Resolutions against **THE ALIEN ACT**, plainly conceded the right of the United States, *to exclude* in all cases, for good reason or no reason, any or all foreigners.

They only contended that the foreigner, being once admitted, in pursuance of law, could not be excluded on the order of the President.

And let it not be forgotten, that the citizen is still a citizen until *he is actually sworn into the Army*. It has been suggested that these are *military tribunals*. But it is well settled that such tribunals (not only in the *Milligan case*, but under Constitutional provisions which cannot be overthrown, except with the Constitution itself), have no jurisdiction over the citizen, by whoever they may be created. And as showing the danger of Conscription Laws in a Republic, and its companion an Espionage Bill, which makes it unlawful to discuss the matter, military tribunals are now imprisoning men; some by sentences, that are simply barbarous through their severity, against men who have not responded. If law prevails in this land, *these men are still citizens*, and not subject to military trial.

This question is for all time and if the bill is to be sustained "farewell; a long farewell to the Constitution."

"NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY OR PROPERTY, WITHOUT DUE PROCESS OF LAW." Amendt. 14.

It has been repeatedly decided that the State acts, *through its officers*. That what the officers of the State do, is the action of the State. It has been demonstrated, it is confidently believed, that Conscription deprives a citizen of both "liberty and

property" and may deprive him of "life" itself, without due process.

The Constitution says, the State *shall not do this*. The Bill says, *the State shall do it*. That is, the Constitution, which in its integrity, is the Supreme Law forbids one thing; the bill requires State officers to do the forbidden acts, *or go to prison as felons*. So accurately stated the State officer takes an oath to support the Constitution. *The bill makes him a criminal if he does so.*

Let us expose further this absurdity—or more properly this destructive view, which puts an end to all Constitutions, if sustained. The distinguished Ex-Solicitor General, thought worthy by reason of his intellectuality—and doubtless properly—to represent the United States in his highest office abroad, says:

"In executing the Federal Law, however, State officials are *pro has vice* Federal officials." (In Brief, Page 72.)

And he cites as the main case *Prigg v. Penna*, 16 Pets. 539. It has been shown that this case *decides the very reverse*. And the great Fugitive Slave Law of 1793, was declared void, by a unanimous Court, for attempting to do, in part, *exactly what the Solicitor General said might be done*.

First: Noticing this statement further. If it was true, it would convert the clearest Constitutional system that was ever constructed where each orbit moves in its allotted sphere harmoniously, into

a monstrosity and impossible system. It may be appropriately said of the Constitution, that though in the breastplate of the High Priest, each gem emitted its peculiar luster, it was only in a joint and associated glow the Divine illumination appeared, so also, our Constitution through its dual character of State and Federal Government is to be regarded as securing its great ends.

Now as to the position taken by the Ex-Solicitor General, *all is thrown into chaos*. To take State officers, and make them, in any degree United States officers, must destroy the State. They may be called upon to perform services, of a different character and in different places, by the two Governments. The two positions are incomparable. This is shown by the very existence of two governments in their distinct powers. As in this case, the Constitution says they shall not do certain things. (XIV Amendment.) Their Federal position *compels them to do the prohibited thing*.

Suppose it should be provided, that the wives of certain men should become "*pro hac vice*," the wives of other men. Does not everyone see that such laws would strike at the very basis of civil society.

And yet not more so than that State officers may be, and at the same time State officers owing duties to one Government, and "pro hac vice Federal officers" of a distinct and independent Government.

Let it be asked can an individual be an officer of one of the States (Governor), and *pro hac vice* an officer of Great Britain? And yet *legally* (though closer associated) the separation of the State, as to its reserved power, is not different from its separation from England, or France.

Beyond all these suggestions the historical fact is we had a Confederation. It proved a failure. And mainly because of the fact that "State officials were *pro hac vice* Federal officials." The further fact is shown, by history, by the Constitution, by uniform decisions—that the Constitution *changed all this*. It created a General Government of all the States, defined its powers, and armed it with officers to carry those powers into effect. And as said by Chief Justice Marshall in the *McCulloch Case*, we find no clause of the Constitution creating a dependency upon State officers in the execution of its powers. And as said by Mr. Justice Field, in *Collector v. Day*, as to the claimed power to tax the salary of a State officer none of the States, as they exist under the Constitution could continue "a despotism might exist." How much worse, if State officers are to become Federal, and if the General Government can put them in prison, from Governor to Constable, if they refuse to perform the duties of the Federal Law, obey the President or the Provost Marshal, even to the neglect and destruction of the State.

That the law can only thus be sustained is de-

monstration that it is not law and not passed "in pursuance of the Constitution."

There are many other objections, but they must be omitted; but I notice one or two statements of the opinion in the *Avers case*, that obscurity may be removed.

It is said that counsel in that and other cases, claimed that citizenship to the State was primary, and therefore, the power to raise an army could not be used, to cause the loss of this dependent condition to the State. It must be said, with due respect to the counsel in that and other cases, that a great cause was called upon to suffer, by such transparent fallacy. It was formerly held that *citizenship was to the State*, and that the State, being a member of the Union, through that relation only was there citizens of the United States. The Fourteenth Amendment, conclusively admits this as the then existing condition. *But even under this theory* the Constitution, which is a Supreme Law between all the States, *authorized Congress to raise an army*. And of course, it could only raise that army, as the Court says, by men. And these men could only *be citizens of a State*.

As the Court points out the Constitution changes this, and makes certain persons a citizen of the State, and next a citizen of the United States. This Author has never been able to understand how this condition could logically exist, (but the Amendment has made it), any more than he can under-

stand how, the same peg can, at the same time fill two separate holes. Or how an individual can be both a male and female. The United States, if we change their name in the Constitution, *if a great Nation* may have citizens. So if we have a Federal Republic *the State* may have citizens. But neither of these conditions change the power of the United States in either case, to raise armies by an express clause.

Nor does it change the right of the United States, in raising an army, to accept *volunteers from the militia*. Neither Government has the right to construe the Constitution, in such a manner, as to destroy the lawful powers of the other. Hence, though the State has a militia, and it is declared to be indispensable to the States, the United States has also the right to raise an army, *and it may enlist members of the militia*. If it did not have this right the State has only to enroll all its able-bodied citizens of military age, in the militia and the ability of Congress to raise an army falls, and is defeated.

But on the other hand, this bill is subject to the reverse objection. It drafts the militia *eo nomine*, and as a whole body, into the army and thus its title might properly be "A Bill To Destroy The State Militia." Mr. Davis contends to the contrary as to its terms—in which he is clearly mistaken—while he virtually admits the legal proposition, if the facts exist.

The President does not agree with the Solicitor.

He calls out the militia. He, *and he alone*, has the power to determine the necessity and to exercise the power. He is responsible to none, but the people; and the Espionage Bill prevents the people from discussing his conduct. Many may think that there was no danger of invasion, and necessity for the call. But His Excellency, the President, having exercised his powers, then immediately drafted the whole body of the militia into the army. DID HE ACT IN PURSUANCE OF THE TERMS OF THE BILL, OR AGAINST IT? The terms of the bill *clearly authorized this to be done*; AND FOR THIS VERY REASON IT IS VOID.

It is said in the opinion, speaking of the defendant's counsel in that case. "The fallacy of the argument results from confounding the Constitutional provisions concerning the militia, with that conferring upon Congress the power to raise armies." Be that as it may, with no disrespect to our present Minister to England; and above all with no disrespect to the opinion, I insist THAT RUNS THROUGH MR. DAVIS' BRIEF, AND PERMEATES THE OPINION ITSELF.

For wherever these two military forces are confounded *in the principles governing them* and the basis of their entire organization "confusion worse than confounded" must follow.

EVOLUTION OF PLAN RAISING ARMIES.

First Plan:

After the fall of the Roman Empire, the Feudal

System emerged. Lands were held by the great lords immediately from the Sovereign. One of the returns was military service. The lord parceled these out among his vassals and tenants. They accompanied him in war, and he accompanied the Sovereign. Plunder of the enemy was an additional inducement, for it was held "To the victor belonged the spoils." This was the plan of raising armies in carrying on war, until Napoleon invented Conscription,

Second Plan:

Out of the French Revolution, on the demand of Napoleon and General Jordan, CAME CONSCRIPTION. This plan, of universal forced military service, was imposed by the Conqueror, Napoleon, upon all the subdued countries. It since has spread to all of continental Europe, and for the first time in England's history, is was in 1916 adopted in Great Britain, by Parliament.

This is the second plan, *which is now sought to be imposed upon the United States.*

Third Plan:

We founded a Government upon an entirely *different* system—BOTH CIVIL AND MILITARY. It is supposed in this Government—and that is the great principle in our Republic—that the PERSONAL services of the citizen, will ever be at the command of his Government VOLUNTARILY both in PEACE AND WAR. And if they will not do so, in

either event, *we better at once stop, in trying to play Republic.* For no Republic can rest on the principles hostile to *Republics.*

Under this system of Government there *are various officers*, both State and Federal of a civil **Nation**. It is supposed that, *without force*, there will always be citizens ready and willing (and let it be said, in passing, there has been no disappointment in this respect) *voluntarily* to assume *these duties and responsibilities.* So in like manner, *it is a principle which cannot be questioned*, that the theory of our whole Government is, that the citizen will **VOLUNTARILY** defend the Republic in war if necessary.

History shows that they have always done so. And this fact, is stated without qualification, by Mr. Wilson in his message to Congress, urging the continental army plan ("A plan" which the military committee of the House had agreed to report, but which fell flat in forty-eight hours after this Author, had filed a brief with the committees, against it; as can be learned, though the fact has been generally suppressed). And this is true because, mainly, of the next statement.

ALL WARS WERE TO BE DEFENSIVE.

History and clear provisions of the Constitution prove this to be true. When we excluded the European system of Government, *we excluded their*

wars of conquest and aggression. And the President correctly stated to Congress, in the message referred to, that Republics were not aggressive.

PREAMBLE TO THE CONSTITUTION,
This declares the great objects of the Constitution. These objects among others are to "insure domestic tranquillity; provide for THE COMMON DEFENSE."

We here see that by this preamble, *the common defense* was one of the objects to be provided for.

This must be done through taxation among other means. We then turn to the first clause, to see for what purpose taxation is to be imposed. And we find that one of the main purposes, for which taxes may be levied, is to "Provide for THE COMMON DEFENSE."

We next turn to *our military system* in order to learn for what purpose it was created. If there is one provision above another, entitled to our praise, *it is the military system of the United States.* For the first time, in the world's history was a plan adopted, which bringing security on the one hand as to foreign naations, *would bring security from military power at home.* We might almost say that the framers of the Constitution were inspired in framing these measures.

First; It is provided that Congress shall have power to raise and support armies. It is then provided that no appropriation for this purpose shall

be for over two years. This allowed an appeal to the people, if the power was abused.

It then next guaranteed to the States a militia. And to secure its fidelity to the State, the officers are to be appointed by the State.

The rules for training the militia are to be prescribed by Congress and uniform throughout the United States. *Here we have a magnificent system. A body of men who are first citizens, with all the rights of citizenship; and in a subordinate sense disciplined and trained soldiers. By this plan, a large army which was once conceded to be dangerous to liberty, is avoided. On the other hand, there is a trained body, ever ready to spring to the defense of the country.*

These two forces were to be of mutual support. The army was to come to the rescue of the State and protect it "against domestic violence." But so careful were the framers, that they provided that this application should come from the Legislatures of the State, or from the Executive, only when the Legislature cannot be convened. And be it said to the praise of President McKinley, as showing the scope of this provision, he refused the application of the Governor of Kentucky, for the very reason that he alleged if the Legislature *was not in session*, it was because the Governor refused to allow it to assemble.

On the other hand WHEN CAN THIS MILI-

TIA BE CALLED TO THE AID OF THE FEDERAL GOVERNMENT?

There is no more important question involved in the solution of the question being considered, than this. The Constitution provides:

“Congress shall have power—to provide for calling forth the militia **TO EXECUTE THE LAWS** of the Union, **SUPPRESS INSURRECTION AND REPEL INVASION.**”

(Art. 1, Sec. 8, Par. 15.)

Mr. Davis in his brief alludes to the fact that the militia are disciplined, and that there are no other citizens so well fitted for soldiers, and asks why they may not be conscripted. The question is pertinent, and of weight, *if Conscription is a valid mode of raising an army.*

But it is **OF TREMENDOUS WEIGHT** to consider, why it is that the militia *cannot be called to the aid of the United States*, except for the three purposes named, namely: “to execute the law; suppress insurrection **AND REPEL INVASION.**” If they are fitted, as the Constitution supposes, to repel invasion, *why are they not made liable for other purposes of War.* Great stress is laid upon Ex-Attorney General Wickersham’s opinion, that the militia can only be used in a defensive war. The opinion was no new discovery, because it is so plainly written in the Constitution *all wars were to be defensive.* We may hunt all the realm of reason,

and there can be but one logical answer. That answer is:

WARS WERE TO BE DEFENSIVE.

This is also clearly shown by other provisions of the Constitution already cited. For instance Congress may suspend the privileges of the great Writ of Habeas Corpus, in case of *rebellion and invasion*. Why not in all wars, as for example in the present? *No answer can be given*, except there were to be no such wars, by our System of a Republic. It is shown incontestable by history, and by the object and ends of our Government. Kings had made war for self-aggrandizement; for the acquisition of territory and for every other unlawful purpose.

Hence, the Constitution took out of the hands of the President two powers possessed by these other rulers. That of raising armies; and that of declaring war. And he is more than man who can erase from the Constitution by reason these provisions clearly showing that wars in this Republic were to be defensive. *For no one can suggest any reason why the Constitution should carefully provide for universal training of the citizen in the militia*, thus fitting him for war; why they should make the rule universal throughout the United States, *so as to make this militia capable of acting as a concrete and uniform body*, if called out, and then omit any provision for the use of this organized military

force on the greatest occasion for its use; namely in waging a Foreign War.

THE ONLY ANSWER TO THESE CONSTITUTIONAL PROVISIONS IS THAT SUCH WARS WERE BEYOND THE PURPOSES OF SUCH CONSTITUTION. We were to escape this curse of Europe and Despotism through war.

The Mexican War, which is the first violation of these principles, was denounced by Webster Clay, (in which War the latter's son gave his life), all New England, and a large body of the people elsewhere as an aggressive war, *and a violation of the above great principle* on which the Republic was founded. And Thomas Corwin, once a Senator, Secretary of the Treasurer, and afterwards Governor of Ohio, in opposing the Mexican War, because *it was not defensive*, uttered the inexcusable sentiment, he "hoped the Mexicans would welcome our soldiers with bloody hands to hospitable graves." (And it may be remarked in passing, that no one thought of prosecuting him.)

That war was defended by its friends, solely upon the ground that Mexico had invaded Texas, and it was in fact a *defensive war*. The war with Spain also violated this rule. And it may be said of McKinley, that had it not been for these newspapers which abuse their freedom, his wisdom would have prevented that War.

So it may be said of the civil war on both sides. The common origin of the people, their association

and affection, *and above all their interests*, would have finally drawn them together again, and settled, without War, the questions that divided them; and those wounds to our Constitution, inflicted through War, which have never perfectly healed, would never have existed.

Of the South, my own section—I refrain from adverse criticisms of the North—was driven into firing on Fort Sumter, by the clamor of these newspapers. *They abused in the vilest terms Mr. Davis for his conservative course* and refusal to resort to actual hostility. He finally yielded and thus war was actually started.

The Fathers founded, in 1800, a party, on the principle of a Strict Construction of the Constitution, and the reserved rights of the States. The Corner Stone was *no power in Congress over Speech and Press*. This spread and embraced New England, and all Sections. The Sons *now forget, both the Fathers and their principles*. They pass an Espionage Act, so radical and extreme, it makes the old Sedition Law, overthrown with actual disgrace to its authors, insignificant and respectable by comparison.

This change is well expressed by a Member of the House from Texas, who said, “When Massachusetts wants a ham, Texas wants a whole hog.”

The whole question is this: WILL WE STAND ON THE LAW AS IT HAS ALWAYS EXISTED; OR WILL WE REVERSE AND DIS-

CARD THIS SETTLED LAW? THE WHOLE QUESTION IS HERE.

I conclude this part with a sentiment.

Republics if they are to continue free must be ever ready to defend with the sword to the last extremity, their country. But as said by General Lee, "Save in defense," it should never be drawn. The sword, for all other purposes than defense, should be made into ploughshare, or rust in the scabbard.

BUT IT MAY BE ASKED WHY DISCUSS, ON AN ESPIONAGE BILL, CONSCRIPTION?

It has been explained at the first of the subject. War called for the Espionage Bill silencing the voice of the people, because it is claimed that people should not have the right to discuss Conscription. That being the situation:

First: If Conscription falls, so does the Espionage Bill fall.

Second: Even if Conscription is valid, then it remains to be inquired has Congress any power over Speech and Press?

General Grant said in the first issue of his work, that when he ordered the second assault at Cold Harbor, he committed an inexcusable blunder. And that when the army refused to obey, the privates in the rank, displayed greater wisdom than the commander.

THIS WAS A NOBLE CONFESSION AND SHOWED THE GREATNESS OF THE MAN. WILL THE JUSTICES OF THE SUPREME COURT NOW EXAMINE THIS QUESTION OF CONSCRIPTION, INVOLVING AS IT DOES THE FUTURE FATE OF THE AMERICAN PEOPLE, AND SAY—NOT AS GENERAL GRANT THAT THEY COMMITTED AN INEXCUSABLE BLUNDER—BUT THAT ON EXAMINATION THEIR DECISION WAS ERRONEOUS.

Hence, I have discussed it. It was necessary to be discussed.

And may the kindly guidance of the Great Ruler, whose judgments are always right, direct the Answer. We have had Conscription, and it has performed its work. The Army so raised, is being disbanded. Let it be put behind for ever—never to be repeated.

THE GOVERNMENT OF THE UNITED STATES IS A GOVERNMENT PROPER; HAVING DELEGATED AND NAMED POWERS AND HAVING BEEN CREATED FOR THE EXPRESS PURPOSE OF EXECUTING THESE POWERS IT MUST DO SO BY ITS OWN OFFICERS.

Commonwealth of Ky. v. Dennison, Governor, 24 Howard 66 and page 107;
Abelaman v. Booth and U. S. v. Booth, 21 Howard 506, l. c. 515-16;
Prigg v. Penn, 16 Peters 539;
Hunter v. Martin, 1 Wheaton 304;
McCulloch v. Md., 4 Wheaton 432;
Justice Field ex parte Ua., 100 U. S., l. c. 358;

Collector v. Day, 11 Wallace 124-6;
U. S. v. Cruikshank and Others, 92 U. S.
 542;
Tarble Case, 13 Wallace 397, 1. c. 406-410;
Ex Parte Seibold, 100 U. S., 1. c. 392-3-4.

Among these powers is that of raising armies. This power is *exclusive* in the Government of the United States; and is further declared to be so by the prohibition upon the States.

There is by the Constitution a division of powers of Government; and within each State two Governments Supreme over two separate and distinct subjects; and where one exists the other does not. The State cannot command the United States; *and it is equally clear the United States cannot command the State Officers or Government.* But few decisions can be quoted.

Commonwealth of Ky. v. Dennison, Governor, 24 Howard, page quoted 107, was an application to the Supreme Court for a writ of mandamus to compel the governor of Ohio to surrender a fugitive from justice. The direct question was: What, if any, power had the United States *over the governor of a State.* The Court said:

“The act” (of Congress providing for the mode of authentication and demand) “does not provide any means *to compel* the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the executive of the State; *nor is there any clause or provision of the Constitution which arms the Government*

of the United States with this power. Indeed such power would place every State under the control and dominion of the general Government, even in the administration of its internal concerns and reserved rights. And we think it clear that the Federal Government, under the Constitution, has no power to impose upon a State officer any duty whatsoever and compel him to perform it; for if it possessed this power it might overload the officer with duties which would fill up his time, and disable him for performing his obligations to the State, and might impose upon him duties of a character incompatible with the rank and dignity to which he was elevated by the State."

This is one of the great leading cases quoted and approved repeatedly ever since to the present. This case has never been adversely criticised, but, as said, followed whenever the question came before the court.

This act first *coerces* the governors and State officers; next *convicts them as criminals if they refuse to obey.*

In *Ableman v. Booth*, 21 Howard 506, the Court says the United States in the "sphere of action assigned to it, it should be supreme and strong enough to execute its own laws by its own tribunals without interruption from a State or State authorities."

And in the *McCulloch* case, criticised as to one feature heretofore, and the enlarged construction therein put upon the general clause, it is yet said:

"No trace is to be found in the Constitution of the intention to create a dependence of the Federal Government on the government of the States, for the execution of the great powers assigned it. Its means are adequate to its ends, and on these means alone it is expected to rely for the accomplishment of its ends."

And in *Collector v. Day*, above, in speaking of the power to tax State officers on their salaries, if it existed, it is said the States would be destroyed by such a measure; "And a despotism might exist."

What must then be said, when State officers are put directly under the command of the President and the Provost Marshal as is done by this bill.

But the whole matter here considered, is absolutely settled *beyond controversy* by the case of *Prigg v. Penn.*, 16th Peters 539.

It is strange indeed that a high officer in the Government, on so important a question, would cite a case as does Mr. Davis (Page 7p, 73 of his brief), without so much as reading the case. It is said in the brief: "It is settled *that power may be conferred upon State officers as such, to execute duties, under an Act of Congress,*" and he cites *Prigg v. Penn.*

The head note in some of the publications is misleading and this perhaps Mr. Davis read. The case itself, by a unanimous Court, decides the very reverse, and that such duties *could not be placed on State officers*. And that decision forms one of the

most noted and excited political contests in this country.

The old fugitive slave law of 1793 provided:

That on the slave being arrested the party "Shall take him or her before any Judge of the Circuit or District Court of the United States, residing or being in the State, OR BEFORE ANY MAGISTRATE OF A COUNTY, CITY, OR TOWN, CORPORATE WHEREIN SUCH SEIZURE OR ARREST SHALL BE MADE." (Page 617.)

The Court *unanimously* decided, that the last provision which has been put in capitals, *rendered the entire fugitive slave law*, which had been enforced for nearly sixty years, void, and *unconstitutional*. And they based that decision *solely* upon the *fact*, that power to return the slave was vested solely in the United States; and the duties which devolved upon the United States, *Congress could not impose upon State officers*. In the opinion of the Court, by Justice Story, it is said:

"The clause is found in the National Constitution and not in that of any State. It does not point out any State functionaries, or any State action, to carry its provisions into effect." (This is the precise condition of the clause as to declaring war and raising armies, except it is added, no State shall do either.)

"*The State cannot, therefore, be compelled to enforce them*, and it might be deemed an uncon-

stitutional exercise of the power of interpretation, to insist, that the States *are bound* to provide means to carry into execution the duties of the National Government, no where delegated or intrusted to them by the Constitution. On the contrary, the natural, if not necessary, conclusion is that the National Government, in the absence of all positive provision to the contrary, *is bound through its own proper departments*, legislative, judicial and executive, as the case may require, *to carry into effect all the rights and duties imposed on it by the Constitution.*" *Prigg v. Penn* on p. 615-16.

In the opinion the Court holds, that whenever power is vested in the Federal Government, the United States in carrying out its exclusive power, States cannot voluntarily pass laws to assist the saying, that under pretense of aiding it might so frame its laws as to harass, embarrass, and even defeat the United States in the execution of its powers. Chief Justice Taney and two of the Justices dissented from this last view, saying the opinion decided when power is vested exclusively in Congress, that "All laws upon the subject passed by the States are null and void, even though intended, in good faith, to protect the owner in the exercise of his right of property, and do not conflict, in any degree, with the Act of Congress." (See separate opinion of Chief Justice Taney, page 227.) He says the question was not before the Court on the record, but as the opinion decides the point he pro-

ceeds to give the view, that where power is vested exclusively in the United States, the State *may in good faith* aid in the execution of the power. No more preplexing question than this could arise. Cogent reasons can be given, as stated by Justice Story, why the State should not intermeddle. And on the other hand, reasons can be given for the position of the Chief Justice.

But it may be said, if the right of the State voluntarily to aid, is conceded, then the present claim, that the duties of the General Government may be placed without the State's consent, upon State officers, and they put in prison if they fail to obey, shows that the views of Mr. Justice Story and the majority should prevail.

That case settled it was supposed for all time the principle that the United States must execute its own powers by its own officers. Congress at once passed the Fugitive Slave Law of 1850 identically like the former law, *except the duty was placed on officers of the United States*. This was afterwards held valid, and for the sole reason, its powers were to be executed by the officers of the United States.

And it is important on the Espionage Bill, that Mr. Lincoln, Seward, Chase and the entire Republican party, denounced the Fugitive Slave Law of 1850 because it was, as they claimed, "A Sedition Law." *Thus showing that the Republican party like Democratic party, denied the power of Congress over Speech and Press.*

HISTORICAL VIEW.

But why discuss cases. One of the greatest curses are case lawyers. To them all knowledge of history and principle are useless. We formed a Confederation. It was a noble system and performed a noble work. It was thought to contain one radical defect. That defect was, there was no Government proper, to execute the laws of Congress. They were in the nature of recommendations to the States. They met in convention and the first resolution they passed, as stated by Mr. Webster in years afterwards, was, that a National Government be established. They meant nothing more than that a General Government be established, and not a great consolidated Nation as he supposed. If anything is settled by history, as well as by the Constitution itself, **THEY ESTABLISHED A GENERAL OR NATIONAL GOVERNMENT FOR CERTAIN DEFINITE PURPOSES.** They made it supreme within its sphere, and gave to it every power, Legislative, Executive and Judicial, necessary to execute in its own name, and by its own authority, the general government of all the States. And as said by Chief Justice Marshall, with absolute truth:

“No trace is to be found in the Constitution of the intention to create a dependence of the Federal Government on the Government of the States, for the execution of the great powers assigned it.”

This is law. This is history. And no man is a

friend of the institutions of his country, and especially where he occupies high place and power, who will undermine this great and indispensable truth, on which the future happiness and prosperity of these States and people depend.

A magistrate in England or Japan might take as affidavit or arrest on warrant and the United States recognize the act; would that authorize England or Japan to raise the United States army?

And there is no room for controversy or argument with even Solicitor or Attorney General, or with Court, who on this great question would undermine this great principle, by pointing to the fact, an affidavit before a State officer may be recognized as valid, by the United States.

WHAT IS THE EFFECT OF THIS BILL, IF STATE OFFICERS MAY, BY STATE AUTHORITY, AID IN CARRYING OUT FEDERAL LAW?

Suppose we say that the view of Chief Justice Taney and his two associates in the separate opinion, *Prigg v. Penn.*, to the effect that *the State may authorize* its officers, to assist officers of the United States. *Is that this case?* Exclusive power to raise armies, is given to the United States, and for a wise purpose. The bill says, ON THE ELECTION OF THE PRESIDENT, State officers can be employed to enforce the draft. *And this bill says, that if State officers do not obey these orders,*

they are guilty of felony and shall go to the penitentiary.

So I ask again, if States, by State authority, may aid in executing Federal law, what authority is that for the United States to say that they shall render such aid, or go to prison for refusal. It is no more reason than if we concede the right of one man, *to give five dollars freely to another as charity*, the other may take five dollars at the point of a pistol. One objection to this Conscription Act, is *it has caused men in power to loose their reason or candor and to become silly, bringing that worst of all conditions brought to ancient Israel, "That children are given to rule over them."* He who undertakes to show, by demonstration, that two and two are five, must become silly. And with no disrespect, it is equally true of those who undertake, in a Federal Republic, founded upon consent of the Governed, to uphold Conscription and Espionage Bills, fitted only where people are subjects and slaves, and live under despotism.

FINAL DEMONSTRATION THAT BOTH THE
CONSCRIPTION ACT, AND THE ESPION-
AGE ACT, WHICH MAKES ITS DIS-
CUSSION AND THAT OF OTHER
IMPORTANT MEASURES A
FELONY, ARE ILLEGAL.

Suppose a man, or a body of men, should assemble for the purpose of devising a scheme, or

plan, by which our Constitution and form of Government might be effectually destroyed by those in power, what effective means could they adopt?

First: Adopt Conscription, by which all able-bodied men, between 18 and 45, can be drafted into the Army by the President.

Second: Put all of the Governors and officers of once sovereign States under the direct command of the President, and the Provost Marshal of the Army.

Thus seducing them from their allegiance to the State, and causing them to look to the President for favors, and a few crumbs.

Third: If they are independent, and refuse to receive orders, convict them as felons and send them to the penitentiary—charge them with conspiracy and corruption, as was done in one instance in this State.

Fourth: Put the entire business of the country under control of the President. Allow him to regulate all the business affairs of the country, both domestic, interstate and foreign. Let him regulate the prices and all business to the farmer and merchant and make them dependent on him. Give him countless spies to nag the steps and actions of the people. Give him countless officers to superintend the smallest details, as necessary to carry out Conscription and Foreign War.

Fifth: Destroy the Militia as a body and a State force.

Sixth: As good measure, organize a great Bank Trust, give them control of all the business; issue ad libitum all government money these Regional Banks want at one per cent and borrow it back at four per cent. Make the President the head or director of this system. In a word, put the sword up to millions of men in one of his hands, and the purse of the whole nation in the other hand.

SEVENTH: THEN AS A FINAL CAP-STONE, DENY TO THE PEOPLE THE RIGHT TO DISCUSS AND CONDEMN THESE AND ALL MEASURES, AND MAKE IT A FELONY TO DISCUSS THESE MATTERS, OR FOR THE PEOPLE TO ASSEMBLE AND PETITION FOR REDRESS.

NOW LET IT BE ASKED, WHAT SINGLE MEASURE IS LACKING IN ORDER THAT THE PRESIDENT MAY BECOME AN ABSOLUTE RULER?

Name one other power necessary to be given the President, to enable him effectually to destroy the Constitution and enslave the people. All these powers now reside with the President. A few years ago, there was no humbler citizen than Mr. Wilson—too poor to buy a piano says a member of his family, and too poor, says he, to even live without the assistance of another private citizen.

Today he has more power than any ruler living in the World, or that ever lived. HE HAS MORE THAN ALEXANDER; MORE THAN EITHER OF THE CAESARS; MORE THAN CROMWELL; MORE THAN NAPOLEON. How did he get it?

If his abilities were a hundred-fold greater than they are, *he could not have produced this existing state of things.* There is a power that has brought about present conditions, and that power is hostile to the perpetuity of our institutions. It is not so much ignorant, and perhaps vicious men, with no power who carry red flags. But it is powerful influences, who hoist high the national emblem, that they may destroy every principle of the Constitution for which it stands. Our country is in danger. Let this last be proved by Mr. Wilson himself. A short time before election in 1902, he said:

“Don’t you know that this country believes something is wrong. What an opportunity it would be for a strong man, without conscience, to spring up and say ‘This way, follow me’— and lead in the path of destruction.”

The limited powers then existing have been pushed aside.

Is any other testimony necessary. And in addition to this, and the foregoing measures, this army bill, which it is illegal to discuss, destroys the militia *as a body*—not merely enlisted members as individuals into the army, which is perfectly legal—which militia is solemnly declared by the Constitution to be necessary to the existence of the States.

The Supreme Court has said these words of warning:

“Wicked men, ambitious of power, with hatred for liberty and contempt of law, may fill the place

once occupied by Washington, and if this right is conceded" (that is to suspend by guarantees of the Constitution *or assume unauthorized powers*) "and the calamities of war before us, *the dangers to human liberty are frightful to contemplate.*" Ex Parte Milligan 4 Wallace, p. 125.

When we regard present conditions; when we look upon these extraordinary measures; when we see especially the President visiting the monarchs of Europe, *and holding secret conferences with them*, there is danger ahead, and we may well ask, without reflecting upon anyone, have the conditions stated so forcibly in the foregoing opinion, fallen upon us. And as to the last, let a word be said.

Since the great lawyers Manning and Somers wrote into the Declaration of Abdication, of James II, that under English law, when he left the Kingdom, *he abdicated the throne*; and when this law was put in the Great Declaration of Right, (the basis of all in State Bills of Rights) *no one has ever questioned that law. Every President has accepted it as a correct principle.* The President and Senate may negotiate a treaty, but where is the power of the President to *hold secret conferences with Foreign Nations at their capitols*, to adopt a policy the professed object of which *is to join us in partnership with all of the despotic European Governments and some of Asia.* We may ask, is this a dream?

THE LENGTH OF THIS BRIEF.

It has been written under many difficulties, the subject was such that brevity was impossible. *It took eight long years to win this liberty. A few hundred pages may well be devoted to its attempted preservation.* In it two among the noblest strains of Revolutionary blood meet in the Author.

He owns the little chest that went through that war. It heard the rattle of the chains one ancestor wore, on the Prison Ship, and saw the dying of his comrades to whom Congress recently erected a monument.

If words have seemed harsh, let this be recalled to excuse.

CONCLUSION.

Our Constitution is not perfect. This is true because it was made by men; but men who having

felt the oppressions of Great Britain, understood full well the blessings to be secured by the great instrument they were framing. It has brought us from thirteen feeble States to forty-eight. Shining originally along the Atlantic as an electric light in surrounding darkness, it has pushed its benign influence until they have reached the Pacific. From a little more than three millions we have grown to more than a hundred. From comparative poverty, we have grown unfortunately to inordinate wealth, which now threatens the very power under which they have thrived. We take billions to be paid by taxation of the poor—however the fact may be disguised—and contribute it to those who have ever been our enemies.

It took eighteen hundred years of the Christian Era to produce such a Government. It will take an equal period to produce another should we allow this to perish. *It is our only hope. It is our only salvation.*

When a noted Divine was about to pass from his great work on earth, his last words for the reign of the Prince of Peace he had served so long and well was, "*Esto Perpetua.*" That is, that reign might be perpetual. Let that now be our prayer for the Constitution, and to that end, let all our energies be bent. If Espionage Bills; Conscription Bills, and present conditions are to continue, then it must perish. If these measures fail, then it may be "*Esto Perpetua.*"

Out of this maelstrom, one thing must appear.

First, the unbridled despotism of the mob (worse than military power), driven to desperation. Second: The great Empire, founded upon Conscription, and the suppression of Free Speech. Third: *The preservation of the Constitution as the patriotic Fathers made it, with the Amendments.*

WHICH SHALL IT BE?

The Supreme Court must answer in these cases. You can restore the Constitution, or you can allow it to perish. What is involved in its loss? Words cannot portray, but it may be said, and not irreverently, that the world can as well afford to lose the Christian Religion, and all it stands for. And that the Constitution is now in danger is due to the fact that in practice much of the power of that religion has been lost.

THE HOPE OF THE FUTURE IS THE PRESERVATION AND THE RESTORA- TION OF THE CONSTITUTION.

No apology is needed in any Court for copying the following Author for whatever may have been his fortune, America never produced a greater or more learned scholar than Jefferson Davis. His humanity; his desire to prevent the effusion of blood; his scrupulous regard for the Customary

Law of Nations, perhaps caused the downfall of the Government over which he presided. He was no more guilty than Lee-Jackson and his humblest follower.

In the Senate in 1860, he said:

“Among the many blessings for which we are indebted to our ancestry is that of transmitting to us a written Constitution; a fixed standard to which, in the progress of events, every case may be referred, and by which it may be measured. *But for this*, the wise men who formed our Government dared not have hoped for its perpetuity; for they saw, floating down the tide of time, wreck after wreck, marking the short life of every republic which had preceded them. With this, (that is a definite written Constitution) however, to check, to restrain, and to direct their posterity, they might reasonably hope the Government *they founded would last for ever*; that it should secure the great purpose for which it was ordained and established; that it would be the shield of their posterity equally in every part of the country, and equally in all time to come.”

“If our government should fail, it will not be from the *defect of the system*, though each planet was set to revolve in an orbit of its own, each moving by its own impulse, yet being all attracted by the affections and interests which countervailed each other; there was no inherent tendency to disruption. *It has been the perversion of the Constitution; it has been the substitution of theories of morals for principles of government*; it has been forcing crude opinions

upon others, which has disturbed these planets in their orbit; *it is this which threatens to destroy the constellation* which, in its power and its glory, had been gathering stars one after another, until, from thirteen, it had risen to thirty-three."

"I have heard with some surprise, for it seemed to me idle, the repetition of the assertion heretofore made, that the cause of the separation was the election of Mr. Lincoln. It may be a source of gratification to some gentlemen that their friend is elected; *but no individual had the power to produce the existing state of things.*"

And what afflicts our country now. All admit conditions are deplorable, and uncertainty exists as to the future. The Constitution and its guarantees seem to be suspended. From a limited Federal Republic, we have gone to a great Central Power, where the will of one man is the supreme law. A public debt, about equals one-fourth of our wealth, must be paid through taxes. For six years past, all has been turmoil and strife.

Again let it be asked and soberly considered, what is it that now afflicts the country?

"It is not from defect of the system."

"It has been the perversion of the Constitution."

"It has been the substitution of theories of morals for principles of Government"—morals which embrace the regulation of the affairs of all

countries, which is beyond every purpose of our Constitution.

“It has been forcing crude opinions on others.” It has been professing to carry on one hand Democracy to others; and on the other destroying Democracy at home, as it existed under the Constitution.

It has been rejecting the advice of Washington, Jefferson and all the Father’s and intermeddling in the affairs of Europe. In undertaking to fight the battles of European powers, and to regulate their Governments. *Crude ideas have taken the place of fixed laws.*

It is these things “which threaten to destroy the constellation, which in its power and in its glory, have been gathering stars one after the other, until from thirteen had arisen to forty-eight.” It is *the change in our fundamental principles* that now has enveloped all in darkness, and threatens all that our enlightened institutions once stood for.

Is there wisdom; is there patriotism in the land? If so, we will now arise, before it is too late, like the Prodigal, and will return to our Father’s house—the Constitution of our Fathers.

Again, this Court can save the Constitution. The question is: WILL IT DO SO? There is no other hope of its return. And into the hands of nine mortal men, inheriting the infirmities of Adam’s race, let that cause be now committed, with the

earnest prayer, arising from the homes of the humble and the palaces of the mighty in united supplication, that in this great responsibility *God will be with them* to direct. But what is now far more important, THAT THEY MAY HAVE THE MORAL COURAGE, TO SAY THAT THIS CONSTITUTION, SHALL NOT PERISH FROM THE EARTH.

In his last letter to Madison, Jefferson said: "Take care of me when I am dead." He meant his great principle of human freedom. The writer of this brief, though called to live an humble life, has taken care of those principles as best he could. He has done so in this brief, when he knew it must bring down upon him the hatred of the ignorant and the vicious, and when he knew that his years precluded any earthly profit to be derived. And he well knows—which will be full compensation—that he will receive a glad welcome on the other shore from Revolutionary ancestors, and from all who aided in that cause.

EXPLANATORY.

The Author has used some plain words in this brief. It was required by the situation and the nature of the case. No malice entered into it, nor did he intend umbrage to anyone. He has tried to speak words of truth in defense of his country and Constitution. If he has erred it has not been intentionally.

This issue is great and can hardly be stated in words. We know what is charged to have existed in Russia, Germany, Prussia and Mexico. But all these countries, if all is said is true, were better under their absolute rulers, than under a headless mob. Cromwell expelled and executed Charles I. Yet England was far better under that despotic ruler than it was under the so-called Commonwealth and was forced to recall his son. Russia under the Czar, Germany under the Kaiser, Mexico under Huerta, was better off than they are today. And so if the dire necessity came the United States would be better off under military power, than under mob violence. And army is governed by the military law at least. The mob knows no law but to tear down and destroy.

No Revolution ever established liberty, except under peculiar circumstances in England in 1688. That of 1776 in our country was not properly a Revolution. The Colonies all had regular Governments. They simply severed the connection which bound them to the Crown (for they claimed that no Union existed as to Parliament) and the machinery of Government, went regularly on.

But if this Constitution is to perish, either through mobs, carrying the Red Flag and tearing down all Governments, because they are founded on law securing liberty; or if it is to perish through the usurpation of powers by those in office, WHAT WILL THEN BE CONDITIONS?

As well ask what would be conditions if the earth ceased to revolve; the sun ceased to shine, or the seasons to return.

Chaos, anarchy, despotism would take the place "of the more perfect Union designed to secure the blessings of liberty."

For the old liberty under the old and sanctified Constitution, with its Amendments, I plead as the only salvation, and to this end, every patriotic man should lend his whole powers and influence.

JOSEPH D. SHEWALTER,
Bachelor of Law University
of Virginia, 1868,
Independence, Mo.

ADDENDA.

HOW MR. LINDQUIST ENTERS CASE.

An apology is due the Court for inserting the following matter. It properly has nothing to do with this case. *But regretfully it cannot be omitted, in view of a paper called a brief*, which has been prepared and filed by Mr. Frans E. Lindquist. The following is stated, that the matter, irrelevantly and partially stated by him, may be correctly presented, for the information of the Court and for what action, if any, the Court may see proper to adopt. This has come to my knowledge since the printing of the foregoing brief. The irrelevant matters referred to commence on Page 96 of Mr. Lindquist's paper.

He sets forth (Page 97) a temporary restraining order by the State Court, restraining Mr. Frohwerk "his agents, servants, employees, or others" acting in concert, or for him, or anyone else, other than the plaintiff herein, (*i. e.*, this attorney) from receiving any of the manuscript, proof sheets or briefs prepared by this attorney.

Having stated this matter, perhaps as some explanation of how Mr. Lindquist gets into this case, when this attorney had represented Mr. Frohwerk throughout, Mr. Lindquist fails to state the material part. This is as follows, which is necessary in

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explanation, and which the Court should know. The petition (in some States called Bill) charged distinctly that Mr. Shewalter was the attorney of Frohwerk, had been so from the beginning; had prepared all the proceedings, as shown by the transcript; and had been working diligently in the preparation of a brief for the Supreme Court of the United States, mainly upon the question of the power of Congress over Speech and Press, which was then nearly completed. Some part of it being in the rough. That Frohwerk and Lindquist (the latter being described not by name, but as a young attorney of Kansas City, a foreigner of some kind), had entered into a conspiracy, to get possession of the manuscript, proof sheets or other matters and to sell and dispose of the same to other parties, unlawfully and in violation of the rights of the attorney. That this was all done secretly. The Conspiracy was charged at length and specifically. And it was learned that Mr. Lindquist had accompanied Frohwerk to Chicago and the latter had received considerable money. The case was set for Dec. 28th for final hearing.

On that day Mr. Frohwerk appeared personally by Mr. Geo. Elliott, as attorney (who now signs Mr. Lindquist's paper), and as he claimed for Mr. Lindquist. To prevent the damaging evidence *the charges of the petition were not denied* and the petition or bill was taken *pro confesso*. The temporary injunction was made permanent. And a further de-

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erree was made that Frohwerk, his agents, servants, employees, and others claiming under, by or through him, were perpetually enjoined from taking, receiving, or using any of this attorney's manuscript, the proof sheets, or finished brief, for any other purpose. The printer employed by Mr. Frohwerk, and agreed to be paid by him, and who had acted in good faith—was ordered and directed to turn over to this attorney, the brief when completed, manuscript, proof sheets and to destroy the type.

This attorney stated to the Court, that he would in good faith complete the brief, file thirty copies in this Court, and give to the Attorney General, or Solicitor General at least two copies, provided Frohwerk would pay for the services of the stenographer and the printing, on its completion. He agreed to pay the Hundred and Forty Dollars, that he owed the printer, referred to in the paper of Mr. Lindquist, *but has never done so*. He has not furnished the means to pay for completing this brief on the special points involved. Hence, that work has not been done, and the brief closed at where practically the interruption occurred, except finally copying and printing some parts.

This Attorney States, that he has no acquaintance whatever with Mr. Lindquist, except he met him on one occasion on the street, when he complimented this attorney on his argument of the demurrer.

A few days before the application for manda-

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mus appears to have been filed, this attorney received a letter from Mr. Lindquist, saying he was going to Washington on other business and he would file *for me* through courtesy an application for a mandamus on Judge Youmans to sign a Bill of Exceptions. I replied, thanking him for his kindness, and saying that Mr. Frohwerk had not the means to pay for the expense of a proper application. That he seemed to know nothing about the facts or law, possibly. That Judge Youmans had signed what was claimed to be a Bill, and the Court would not compel him to sign another, *except under peculiar circumstances*. That if these last were shown, there was a possibility of the Court going a little farther, than it had ever gone, but this necessitated the printing of the extended correspondence with the Judge. *I positively refused to give him any authority whatever.*

A few days after this Mr. Frohwerk announced he was going to Chicago, and had but a few minutes to catch the train. I had previously urged him not to go to Chicago, or have anything to do with other parties on Mr. Lindquist's representations; and that I was defending this case on high moral grounds, to test the Constitutional question. I learned that next day that Mr. Lindquist had also gone to Chicago. A few days afterwards, my attention was called to a newspaper article (which was exaggerated as to the effect of the action by the Supreme Court on the Frohwerk case), that an appli-

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cation had been made to, and refused by the Supreme Court for a mandamus. I was greatly annoyed, and embarrassed by being stopped upon the street and inquires made I could only reply I had nothing to do with that matter, and knew nothing about it whatever, except what was printed. Prominence had been given to the case, and it was generally known that this attorney represented Mr. Frohwerk, and was seeking to test the constitutional question.

I therefore wrote the paper, that I had no connection with the application, and knew nothing about it. And if it had been authorized by Mr. Frohwerk I would, in good faith, complete his brief but would not argue his case.

I understand that Mr. Lindquist has represented to the Clerk that I have withdrawn from the case. This is not true, except in so far, that I had said I would not argue this case for Mr. Frohwerk, if he was guilty of this objectionable conduct—deceiving, misleading me and selling my hard labor to others. Whereas I had received no compensation from him, except a sum sufficient barely to pay actual expenses.

Mr. Lindquist informs the Court I am not a member of the Bar of the Supreme Court. While it is of no interest, I may say, that I was formerly engaged in the actual practice of law as a mere country lawyer, living upon my suburban farm, as was customary, a recluse and student. But I had a

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general practise, probably as large as any attorney in Western Missouri. For twenty years I have practically retired. The brief I have filed will be some evidence in the matter. I was a country lawyer from choice not necessity.

A hasty examination of the paper prepared by Mr. Lindquist shows *practically none of the questions raised by the record, have been* touched upon, peculiar to the Plaintiff In Error case.

These questions are important. They are raised by the Demurrer; by the Assignment of Errors, and especially set forth in the Specification of Errors relied upon in this Court. But they are passed by *sub silencio* and with averted eye in Mr. Lindquist's paper. Practically nothing is embraced, except comments upon the articles published, which speak for themselves. I would therefore ask these exceptions—a Brief in themselves almost—be examined, occurring as they do on the Record proper.

The application for a mandamus furthermore does not state the facts in several respects. On the statement made the Court could do nothing else than refuse to grant the Writ. The actual facts are stated in the brief which I will file, commencing on page 10.

Mr. Lindquist does me, however, great honor. He, in effect, asks the Court to take judicial knowledge that I would not write an improper article. He had a shorter course. Lord Bacon said to Elizabeth a certain author could not be convicted in the Star

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Chamber of treason, but he might be for larceny. He explained, that the Author had taken passages from Tacitus, translated them into English and claimed them as his own. So in this case, the Article simply sets out our Military system, as it appears by the Constitution, and almost bodily appropriates an opinion of this Court in a leading Case.

I have thus stated this irrelevant matter that the facts might be laid before the Court truly, in explanation of Mr. Lindquist's partial statement and how he appears on the scene.

This Brief, for reasons stated, has not set forth errors peculiar to this case. With one exception the paper by Mr. Lindquist has not done so. The Court is urged to see these, page 80, Transcript of the Record, "Points Relied On" and also substantiary in the Assignment of Errors, page 67, Transcript. This is a brief in itself. The Plaintiff in Error ought to be entitled to their consideration. It may be said he was subjected to great temptation, to get money for his defense, *and was misled by others*. This should not prejudice the consideration of his case. *And it is hoped the Court will examine these points, as if made in brief, and it is believed that they are all sufficient for a reversal.*

Respectfully,

JOSEPH D. SHEWALTER.